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IN THE

Supreme Court of the United States

October Term, 1965

No. 502

RAYMOND DENNIS, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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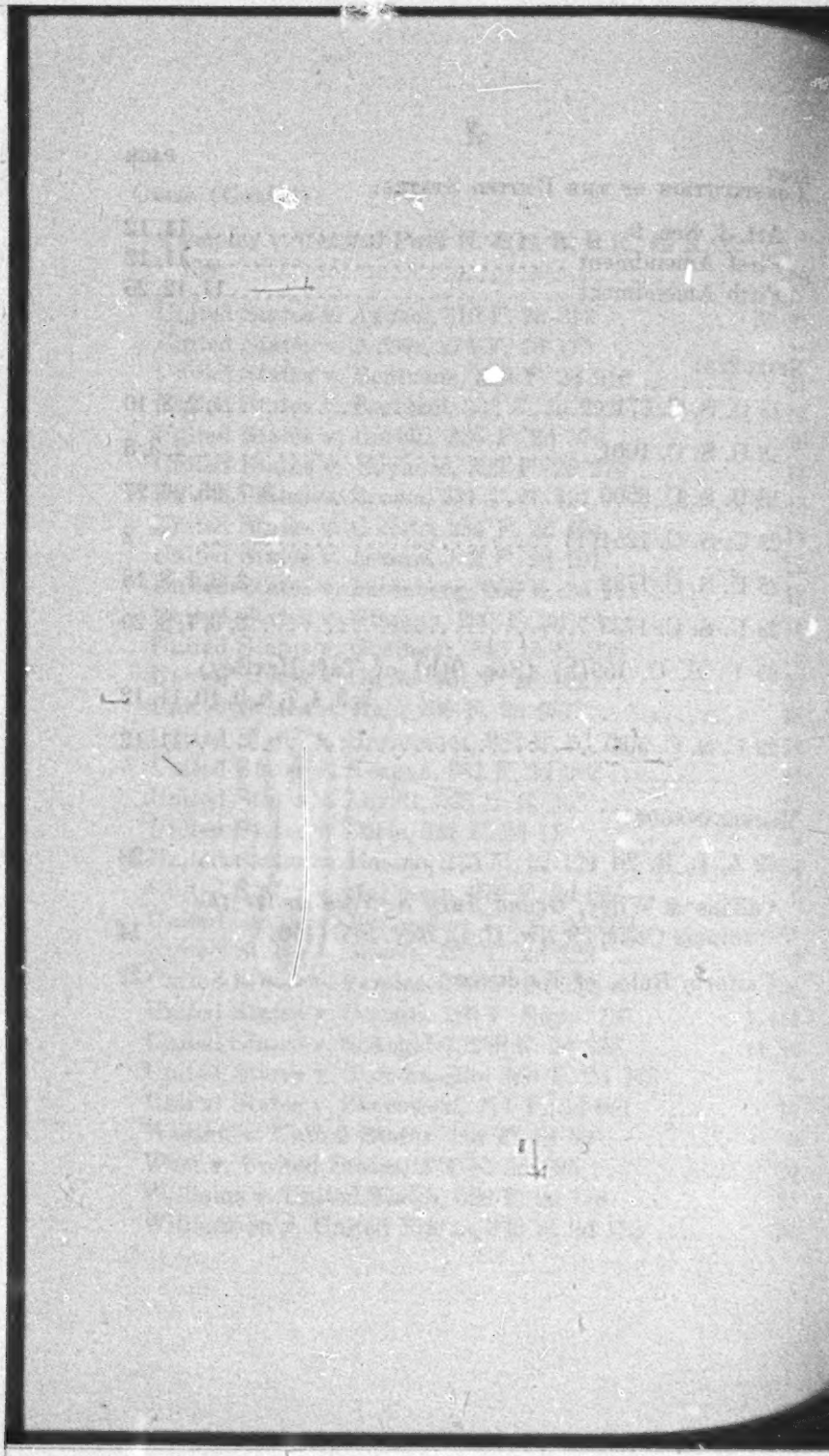

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No.

RAYMOND DENNIS, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled case on April 26, 1965, affirming judgments of the District Court for the District of Colorado, entered upon a jury verdict, convicting petitioners of conspiracy to defraud the United States, in violation of the general conspiracy statute, 18 U. S. C. 371.

Opinion Below

The opinion of the court below supporting the judgment sought to be reviewed (*infra*, App. A1, pp. 2a-20a) is reported at 343 F. 2d 10. The opinion of the court below reversing the judgments of conviction against petitioners at their first trial under the indictment (*infra*, App. A2, pp. 21a-36a) is reported at 302 F. 2d 5. The opinion of the District Court for the District of Colorado denying the defendants' motion to dismiss the indictment (*infra*, App. A3, pp. 37a-44a; R. 13-19) is reported at 160 F. Supp. 787.

Jurisdiction

The judgment of the Court of Appeals was entered on April 26, 1965 (*infra*, App. A, p. 1a). A petition for rehearing and two supplements thereto were denied on June 28, 1965. By order of Mr. Justice White, the time for filing a petition for certiorari was extended to August 27, 1965. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Questions Presented

Petitioners and others were indicted in 1956 under the fraud clause of the general conspiracy statute (18 U. S. C. 371) for conspiring to defraud the United States by causing to be filed with the National Labor Relations Board false affidavits denying membership in and affiliation with the Communist Party. The affidavits were filed pursuant to Section 9(h) of the Taft-Hartley Act, 29 U. S. C. 159(h), repealed in 1959, which made applicable to such affidavits the provisions of the so-called "false statements" statute, 18 U. S. C. 1001. The questions are:

(1) Whether the indictment states the offense of conspiracy to defraud the United States;

(2) Whether, in the comparative light of *American Communications Ass'n* v. *Douds*, 339 U. S. 382, and *United States* v. *Archie Brown*, 381 U. S. 437, Section 9(h) of the Taft-Hartley Act is constitutional;

(3) Whether the trial court erred in denying petitioners' motions for the production, to the defense or the court, of grand jury testimony of prosecution witnesses;

(4) Whether the trial court erred in excluding documentary evidence offered by the defense under the business records and other federal statutes, 28 U. S. C. 1732-33;

(5) Whether the petitioners were otherwise denied a fair trial by the trial court's (a) instructions to the jury with respect to "vicarious admissions" and the weight to be given the testimony of alleged accomplices and (b) admission of testimony given at petitioners' first trial by a prosecution witness who died prior to their second trial, in view of rulings at the first trial (under 18 U. S. C. 3500 and otherwise) which limited cross-examination of the witness; and

(6) Whether the evidence is sufficient to support the judgments of conviction of conspiracy under the standards prescribed in *Ingram* v. *United States*, 360 U. S. 672, *Kotteakos* v. *United States*, 328 U. S. 750, and other decisions of this Court.

Statutes Involved

The relevant provisions of the Constitution of the United States, the "false statements" act (18 U. S. C. 1001), the National Labor Relations Act as amended by the Labor-Management Relations Act of 1947 (29 U. S. C. 159), the federal conspiracy statute (18 U. S. C. 371), the federal business records and government records acts (28 U. S. C. 1732-33), and the "Jencks" Act (18 U. S. C. 3500), are set forth in Appendix B, *infra*, pp. 45a-49a.

Statement of the Case

The one-count indictment (R. 3-8), returned November 16, 1956, in the United States District Court for the District of Colorado, charged the six petitioners and eight others with conspiracy to defraud the government, in violation of the fraud clause of the general conspiracy statute (18 U. S. C. 371). All of the defendants were or had been officers or staff employees of the International Union of Mine, Mill and Smelter Workers, hereinafter called "Mine-Mill".

Section 9(h) of the Taft-Hartley law provided that labor unions desiring to use the facilities of the National Labor Relations Board must establish a compliance status, for which it was required that affidavits by the union's "officers", denying membership in or affiliation with the Communist Party,[1] be on file with the Board. The gravamen of the charge in the indictment is that the accused conspired to defraud the United States by effecting Mine-Mill's compliance, through having those defendants who were Mine-Mill officers file affidavits falsely denying that they were members of or affiliated with the Communist Party. The affidavits in question were filed from 1949 to 1955 (R. 6-7).

The defendants moved to dismiss the indictment on the grounds, *inter alia*, that Section 9(h) was unconstitutional, that the prosecution was in part barred by the statute of limitations, and that the indictment failed to state the offense of conspiracy to defraud the government within the rule of *Bridges* v. *United States*, 346 U. S. 209. This motion was denied in March, 1958. *United States* v. *Pezzati*, 160 F. Supp. 787.

Eleven of the accused stood trial in 1959 and nine were convicted.[2] In March, 1962, the Court of Appeals reversed the judgments of conviction with instructions to dismiss the indictment as to two of the defendants. *Dennis* v. *United States*, 302 F. 2d 5; *infra*, App. A2, pp. 21a-36a. The seven remaining defendants were tried again in 1963; the jury acquitted one and convicted the six petitioners. The Court of Appeals affirmed the judgments of conviction and denied

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[1] Section 9(h) also required that the affidavits deny "belief in" and "support of" any organization teaching violent overthrow of the United States government, but the indictment does not involve that part of the statute, and the jury was so instructed (R. 1017).

[2] Three of the 14 accused pleaded *nolo contendere*, and two were acquitted by direction of the trial judge at the close of the government's case.

a petition for rehearing timely filed, and supplemented following the decisions of this Court in *Baxa* v. *United States*, 381 U. S. 353, decided May 24, 1965, and *United States* v. *Archie Brown*, 381 U. S. 437, decided June 7, 1965.

Mine-Mill is a union operating in the non-ferrous metals field. Its compliance with the Taft-Hartley filing requirements and use of the Board's facilities are not disputed. Nor is it disputed that non-Communist affidavits were made and filed by the four petitioners who were officers of Mine-Mill during the period covered by the indictment.[3]

The prosecution's evidence of conspiracy among the defendants was intended to establish that:

(1) Following enactment of the Taft-Hartley Law in 1947, Communist Party policy opposed compliance;

(2) The defendants were then members of the Communist Party, and caused Mine-Mill to follow the Communist policy of non-compliance;

(3) In 1949, the Communist Party changed its policy and instructed Party members who were union officers to file non-Communist affidavits, and to resign formally from the Party but retain a clandestine membership;

(4) In accordance with the new Party policy, Mine-Mill officers filed non-Communist affidavits and the union obtained compliance status;

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[3] One of the petitioners (Sanderson) has never been an officer, and another (Skinner, now the president, R. 834) was not an officer during the indictment period. Two others (Dennis and Dichter) became and still are officers and filed affidavits during the indictment period, but were not such at the time (June, 1949) that the conspiracy is alleged to have been formed. The other two (Travis and Wilson) were officers and filed affidavits at that time; Wilson ceased to be an officer in 1953, but is still an employee of Mine-Mill, while Travis ceased to be an officer or in any way connected with Mine-Mill in 1955.

(5) The defendants at that time (July, 1949) agreed that the union officers among them would secretly remain Party members and would file false affidavits; and

(6) That agreement (*i.e.* the conspiracy) continued and was executed by repeated false filings up to the time of the indictment.

It is not disputed that Mine-Mill opposed the Taft-Hartley law and did not comply with the filing provisions until July, 1949, when, by Executive Board action, the union decided to comply. This decision was ratified in September at the union's annual convention (R. 711).

Direct evidence of conspiracy among the defendants is entirely lacking. As indirect evidence, the prosecution relied chiefly on the asserted "parallelism" between Communist Party and Mine-Mill policies with respect to compliance, on testimony concerning statements by petitioners Travis and Wilson in 1949, and especially on a public statement by Travis in August, 1949, that he had been a member of the Communist Party and had resigned from it "in order to make it possible for me to sign the Taft-Hartley affidavit" (G. Ex. 8).[4]

Other prosecution evidence is described in subsequent portions of this petition relating to the evidentiary questions presented (*infra*, pp. 16-31).

Defense witnesses testified that Mine-Mill policies with respect to compliance and non-compliance were determined freely, openly and democratically. Trade union reasons for these policies were described by the defense witness John Clark, who was secretary-treasurer of the union in 1948 and president from 1948 to 1963 (R. 794-809).

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[4] Travis was indicted for and convicted of the substantive offense of filing false affidavits, but, after two trials, his convicion was set aside by this Court on the ground of improper venue. *Travis* v. *United States*, 364 U. S. 631. He was not thereafter reindicted.

As additional evidence against the "parallelism" inference relied on by the prosecution, the defense offered an authenticated National Labor Relations Board tabulation (Defs. Ex. Y) showing that many other labor organizations followed substantially the same compliance policies and at the same time (R. 908-09). To contradict prosecution testimony particularly implicating petitioners Travis, Dennis and Dichter, the defense offered Dichter's travel and per diem vouchers, to establish what amounted to an alibi (Defs. Exs. Q-1 to Q-5 for Ident., inclusive; R. 771-74). The exclusion of these documents by the trial court raises important questions under the federal business records and government records statutes, 28 U. S. C. 1732-33.

In the course of trial, the district court denied defense motions for production (alternatively to the defense or to the court for *in camera* inspection) of the grand jury testimony of three prosecution witnesses (R. 106-09, 494-95, 581, 618-19, and 645). The court likewise admitted the record of testimony given at the first trial by the subsequently deceased government witness Mason, overruling defense objections based on rulings made at the first trial, under 18 U. S. C. 3500 and otherwise, which had deprived the defense of full opportunity to cross-examine Mason at the first trial (R. 129-30 and 280-408).

In charging the jury, the district judge failed to instruct them that fraud was an essential element of the offense charged (R. 1008-09), to limit the jury's permissible consideration of "vicarious admissions" including many which were not in furtherance of the alleged conspiracy (R. 1012-13), or to caution them with respect to the consideration of testimony by accomplices (No. 5, R. 1120).

Reasons for Granting the Writ

Petitioners have been convicted pursuant to Section 9(h) of the Taft-Hartley law, the constitutionality of which was sustained in *American Communications Ass'n* v.

Douds, 339 U. S. 382. The authority of the *Douds* case was seriously shaken if not entirely destroyed by the decision in *United States* v. *Archie Brown*, 381 U. S. 437, decided June 7, 1965, and the constitutionality of Section 9(h) thus presents an important question. We doubt, however, that it is necessary for the Court to reach the constitutional question, inasmuch as the indictment, charging as it does a conspiracy to defraud the United States but setting forth merely a conspiracy to commit an offense of which fraud is not an element, fails to state the offense charged and must be dismissed under the rule of *Bridges* v. *United States*, 346 U. S. 209.

Beyond these questions pertaining to the constitutional and statutory validity of the indictment, the trial of this cause precipitated procedural and evidentiary issues which are basic to the fair administration of criminal justice. Several of the rulings below, including those denying defense motions for production of grand jury testimony of prosecution witnesses for impeachment, excluding union and government records offered under the federal business and government records statutes, declining to rule that certain statements were not in furtherance of the conspiracy, and declining to caution the jury with respect to the testimony of alleged accomplices, are in conflict with decisions of other courts of appeals. These and other rulings are likewise contrary to the applicable decisions of this Court.

1. *Insufficiency of the Indictment.* The indictment explicitly charges a conspiracy to defraud the United States by fraudulently obtaining for Mine-Mill the services and facilities of the National Labor Relations Board (R. 4). However, the only conduct alleged is a conspiracy to file false affidavits, and, under the provisions of 9(h), filing a false affidavit was made a violation of 18 U. S. C. 1001, the false statements act. This Court has doubted that fraud is an essential element of the offense condemned by

that act. *United States* v. *Grainger*, 346 U. S. 235, 241-43. The Court of Appeals for the Seventh Circuit held that fraud is *not* such an element in *United States* v. *Lurie*, 222 F. 2d 11; see also *United States* v. *Tommasello*, 160 F. 2d 348, 350 (C. C. A. 2); *Wesson* v. *United States*, 164 F. 2d 50 (C. C. A. 8); *Marzani* v. *United States*, 168 F. 2d 133 (C. A. D. C.), aff'd by an equally divided Court, 335 U. S. 895 and, upon rehearing, 336 U. S. 922.

The fact that the indictment is "framed" in the language of conspiracy to defraud is irrelevant where such language "merely cloaks a factual charge" of an offense in which fraud is not an essential element. *Bridges* v. *United States*, 346 U. S. at 223-24; *United States* v. *Lurie*, *supra*; *cf. United States* v. *McElvain*, 272 U. S. 633, 639. The district court sustained the indictment on the ground that it specified a conspiracy to defraud (R. 18, and *infra*, App. A3, pp. 37a-44a), disregarding the admonition in the *Bridges* case that the sufficiency of the charge of fraud must be tested by the specific allegations.[5] The decision below, accordingly, is squarely contrary to the rule of the *Bridges* case, the dictum in the *Grainger* case, and the decision of the Court of Appeals for the Seventh Circuit in the *Lurie* case.

Indeed, the element of fraud is even more remote in the present case than in those just cited. In the *Bridges* case, for example, it was charged that fraud was present in fact (*i.e.*, in obtaining naturalization by means of a false statement) even though the relevant section of the Nationality Act applied to all false statements, whether or not fraudulent (346 U. S. at 212-13). But under Section 9(h) a union obtained compliance status by the filing of affidavits, whether true or false; the Board did not rely on the truthfulness of the non-Communist affidavits. *Leedom* v. *International Union of Mine, Mill and Smelter Workers*, 352

[5] The Court of Appeals sustained the indictment on the basis of the district court's opinion (*infra*, App, A2, p. 22a).

U. S. 145; *Amalgamated Meat Cutters* v. *National Labor Relations Board*, 352 U. S. 153.

No doubt the allegations of this indictment would support a charge under the offense clause of 18 U. S. C. 371, and indeed the indictment was lodged under that clause in the only other conspiracy prosecution under Section 9(h). *West* v. *United States*, 274 F. 2d 885 (C. A. 6), cert. den'd, 365 U. S. 811, 819.[6] Of course, the distinction between conspiracies to defraud and conspiracies to commit offenses, far from being merely technical or formal, has important practical consequences in terms of double jeopardy, the statute of limitations, and other related matters. In view of the lapse of over seven years[7] between the alleged formation of the conspiracy (as well as the first overt acts) and the filing of the indictment, it would appear probable that the government selected the fraud clause with an eye to the statute of limitations. Cf. *Bridges* v. *United States*, *supra*.

That the trial judge himself[8] thought fraud to be irrelevant to the conspiracy alleged is manifest from his charge to the jury, in which he failed to instruct that they would have to find fraud in order to convict, and explicitly instructed the jurors (R. 1009) that the offense would be complete "when it is shown beyond a reasonable doubt that the defendants conspired . . . to file false non-Communist

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[6] The indictment in the present case was lodged before, and in the *West* case after, this Court's decision in the *Leedom* and *Meat Cutters* cases, *supra*.

[7] Inasmuch as the pertinent statute of limitations was changed from five to three years on September 1, 1954, there is a question which period would properly be applicable to this indictment.

[8] The case was tried before Chief Judge Arraj. The opinion and order denying the motion to dismiss the indictment were entered by the late Chief Judge Knous (R. 13-19; *infra*, App. A3, pp. 37a-44a). The motion was originally argued before then District Judge Breitenstein, who withheld action because of the "serious problems" presented by the motion, and subsequently, upon his confirmation as Circuit Judge, referred the matter to Judge Knous.

affidavits with the National Labor Relations Board, and that at least one overt act was done in furtherance of the conspiracy."[9]

2. *Constitutionality of Section 9(h).* The constitutionality of Section 9(h) of the Taft-Hartley law was challenged soon after its enactment on the grounds, *inter alia*, that it violated Article I, Section 9 (Bill of Attainder) of the Constitution and the First and Fifth Amendments. The law was upheld (with respect to the membership and affiliation portions of the affidavits) against these objections in the *Douds* case, *supra*, Mr. Justice Black dissenting.[10]

The 1959 repeal of Section 9(h) and substitute enactment of Section 504 of the Landrum-Griffin law (29 U. S. C. 504) precipitated the *Archie Brown* case, *supra*, decided at the last term of this Court. In that case the Court of Appeals for the Ninth Circuit had held (334 F. 2d 488) Section 504 unconstitutional under the First and Fifth Amendments, basing its decision principally on *Scales* v. *United States*, 367 U. S. 203, and *Noto* v. *United States*, 367 U. S. 290, and reading those cases as holding that membership in the Communist Party, without accompanying elements of intent and activity, does not provide a constitutionally sufficient ground to support a criminal conviction. At about the same time this Court, in *Aptheker* v. *Secretary of State*, 378 U. S. 500, held Communist membership, without more, insufficient, under the due process

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[9] On the basis of this charge we argue (*infra*, pp. 30-31, n. 34) that acceptance of the government's theory of conspiracy to defraud would in any event require reversal of the judgments of conviction, inasmuch as on that theory an essential issue was not put to the jury. In fact, the charge authorized the jury to convict of one crime (conspiracy to file false affidavits) on an indictment charging another (conspiracy to defraud). This is a denial of due process. *Cole* v. *Arkansas*, 333 U. S. 196.

[10] Mr. Justice Douglas did not participate, but dissented in the subsequent case of *Osman* v. *Douds*, 339 U. S. 846, 847.

clause of the Fifth Amendment, to support prohibition of the right to travel abroad.

In this Court, the respondent in the *Brown* case relied strongly on the *Aptheker* case and the opinion below, but neither the majority nor minority opinions expressed any views concerning the arguments based on the First and Fifth Amendments. Instead, a majority of the Court held Section 504 unconstitutional as a bill of attainder, on the ground that it designates the Communist Party by name instead of utilizing a general description of the legislatively undesirable characteristics. The Court remarked that the *Brown* case "is not necessarily controlled by *Douds*", but at the same time criticized the *Douds* case as inconsistent with previous interpretations of the bill of attainder clause, and declared that the *Douds* opinion "misread *United States* v. *Lovett*. . . ." (328 U. S. 303). The four dissenting justices expressed the opinion (per Mr. Justice White) that the *Douds* case "is obviously overruled".

This petition is not the appropriate place for extensive analysis of these constitutional problems. It seems apparent that the essential reasoning of the *Aptheker* and *Brown* cases is applicable to and casts grave doubt on the constitutionality of Section 9(h), and that the authority of the *Douds* case has been seriously undermined if not totally destroyed.

Accordingly, if this case is not disposed of under the first ground urged in support of this petition (*i.e.*, the statutory insufficiency of the indictment), it would appear that the constitutional questions require review by this Court. It is true, of course, that Section 9(h) has been repealed, but surely that circumstance could not justify either the conviction or the retrial of these defendants under an indictment based on a statute which violates fundamental constitutional guarantees.

3. *Access to Grand Jury Testimony of Prosecution Witnesses.* At the trial the defense moved for the produc-

tion, for impeachment purposes, of grand jury testimony given by three prosecution witnesses (Locke, Fikes, and Gardner).[11] Alternatively, the defense moved that the trial judge examine the testimony *in camera* and make it available to the defense if inconsistencies between grand jury and trial testimony were discovered. The trial court denied all such motions on the ground that no "particularized need" had been shown (R. 106-09, 494-95, 581, 618-19, and 645). Acknowledging that the practice differed in other circuits, and that it would have been "safer" to grant the request for *in camera* inspection, the Court of Appeals nevertheless affirmed the district court's ruling on the ground that cross-examination of these witnesses had revealed no "manifest inconsistency" (*infra*, App. A1, p. 13a).

This Court last dealt with the question of access to grand jury testimony for impeachment purposes in *Pittsburgh Plate Glass Co.* v. *United States*, 360 U. S. 395,[12] wherein it was held (360 U. S. at 400) that grand jury minutes should be made available directly to the defense in c[illegible] where a "particularized need" is shown. The Court declined to pass on the duty of the trial judge, absent such a showing, to examine the minutes *in camera*, deeming that question not properly raised (360 U. S. at 401). Four justices dissented and expressed the view (derived from *Jencks* v. *United States*, 353 U. S. 657, 667-69) that since *in camera* inspection by the judge may not sufficiently protect the rights of the accused, the relevant testimony of prosecution witnesses should be produced directly to the defense on request.

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[11] The denial of a similar motion on the first trial for Mason's grand jury testimony was one of the grounds for objecting to the admission of his first trial testimony on the second trial (*infra*, p. 25).

[12] Questions comparable to those here raised were presented to the Court under the grant of certiorari in *Travis* v. *United States*, 363 U. S. 801, but the decision (based on improper venue) did not reach them.

It is apparent that the lower court, in restricting the right to *in camera* inspection by the requirement of "particularized need", misapplied the rule of the *Pittsburgh Plate Glass* case. The ruling below is squarely contrary to numerous decisions in the Second and District of Columbia circuits, where *in camera* inspection upon request of the defense is automatic (Second Circuit), or granted whenever the testimony is of great importance (District of Columbia Circuit). See, *e.g.*, *United States* v. *Spangelet*, 258 F. 2d 338 (C. A. 2); *United States* v. *Hernandez*, 282 F. 2d 71 (C. A. 2); *United States* v. *Giampa*, 290 F. 2d 83 (C. A. 2); *Simmons* v. *United States*, 308 F. 2d 324 (C. A. D. C.); *Harrell* v. *United States*, 317 F. 2d 580 (C. A. D. C.).

This conflict in the practice of the federal courts was acknowledged in the opinion below (*infra*, App. A1, p. 12a), and has been remarked by commentators.[13] *In camera* inspection gives full protection to the values of grand jury secrecy, and it seems pointless to require a special showing of need, the bounds of which are difficult to specify and are causing awkward conflicts in federal criminal practice.[14]

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[13] Calkins and Wiley, *Grand Jury Secrecy under the Illinois Code*, 59 Nw. U. L. Rev. 577, 581, n. 18 (1964). The authors cite additional cases and conclude that the Seventh Circuit follows the practice of the Second Circuit, while the Eighth and Ninth Circuits are in accord with the ruling below.

[14] In addition to the cases cited in the text, *supra*, see *United States* v. *McKeever*, 271 F. 2d 669 (C. A. 2); *United States* v. *Boyance*, 329 F. 2d 372, 376-77 (C. A. 3); *United States* v. *Bertucci*, 333 F. 2d 292, 297 (C. A. 3); *United States* v. *Micele*, 327 F. 2d 222, 226-27 (C. A. 7); *United States* v. *Coduto*, 284 F. 2d 464 (C. A. 7); *United States* v. *Keegan*, 331 F. 2d 257, 263 (C. A. 7); *Berry* v. *United States*, 295 F. 2d 192, 194-95 (C. A. 8); *Brilliant* v. *United States*, 297 F. 2d 385 (C. A. 8); *Hance* v. *United States*, 299 F. 2d 389 (C. A. 8); *Herzog* v. *United States*, 226 F. 2d 561 (C. A. 9), *aff'd en banc*, 235 F. 2d 664; *Bary* v. *United States*, 292 F. 2d 53, 56 (C. A. 10); *Gordan* v. *United States*, 299 F. 2d 117, 313 F. 2d 582 (C. A. D. C.), cert. den'd, 374 U. S. 839.

It is significant to note that the government itself formerly favored the adoption of the Second Circuit rule. See *Pittsburgh Plate Glass*, 360 U. S. at 408-09 (dissenting opinion), and brief for the United States (p. 20) in *United States* v. *Spangelet*, 258 F. 2d 338 (C. A. 2).

The court below has itself been divided on this question in other cases.[15] Inevitably, the requirement of "particularized need" degenerates into a requirement that the defense show inconsistencies in the prosecution witness' testimony. That, however, is the very purpose of requesting the grand jury transcript, and the practical effect is to bar the defense in the very situations where access to the records might be of most value for impeachment purposes. In the present case, even though the court below recognized substantial variances in the testimony (*infra*, App. A1, pp. 5a-6a),[16] the trial judge refused to look at the grand jury transcript, apparently because he feared it would be physically burdensome (R. 107).

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[15] See *Travis* v. *United States*, 269 F. 2d 928, rev'd on other grounds, 364 U. S. 631, wherein Chief Judge Murrah (author of the opinions below in the present case) dissented from the denial of *in camera* inspection on the ground (269 F. 2d at 946-47) that "there was no conceivable way of showing a particularized need unless the accused could get the grand jury testimony before the court."

[16] Petitioners' showing of "particularized need" was plainly sufficient. Aside from the significant difference in Fikes' first and second trial testimony about a crucial episode on which the court below commented (*infra*, App. A1, pp. 5a-6a) his credibility was further undermined by the showing that he had twice lied under oath about his membership in the Communist Party (R. 532-34, 538-41) and had given untruthful testimony in other proceedings as to his whereabouts in certain years (R. 535-37). Locke's testimony was seriously impeached by his own travel and per diem vouchers (R. 112-18, 125-28).

Gardner and Mason were the other key prosecution witnesses. Gardner was the only witness who gave testimony (R. 551-78) against each of the petitioners and the only one who gave testimony against three of them—Dennis, Dichter, and Sanderson—relating to matters during the period of the conspiracy. Mason's testimony against Travis (R. 29-312, 315-19) was probably the most critical piece of evidence in the case. He also testified against Skinner (R. 312-14) and Wilson (R. 319-20), and, as the case was submitted to the jury, his testimony was usable against all the petitioners. None of the testimony of these witnesses was corroborated.

In the light of the conflicting decisions in the lower federal courts, this Court may also wish to reconsider the conclusion reached in the *Pittsburgh Plate Glass* case.[17] Production of grand jury testimony directly to the defense seems to have been virtually eliminated,[18] despite the majority's statement that it should be allowed on the basis of "particularized need" and the minority's view that it should be allowed as a general proposition, under the principles of the *Jencks* case.

4. *Exclusion of Business and Government Records.* (a) The prosecution witness Locke testified that in the spring of 1948 he was working for Mine-Mill in Detroit (R. 69); that on April 8th he came to Cleveland on the instructions of the Mine-Mill Board member for that area, Kenneth Eckert, to attend a meeting of delegates of the Die Casting Division of Mine-Mill (R. 69-70); that at this meeting Eckert offered a resolution (G. Ex. 1) calling for a change in Mine-Mill policy so that compliance with the Taft-Hartley law might be effectuated (R. 71-2); that on the same or the next day the petitioner Travis came to Cleveland (R. 74) and, at a meeting of Communist mem-

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[17] Apart from conflict with respect to when *in camera* inspection should be allowed, the inspection process itself is productive of appeals and reversals. In three cases, the Court of Appeals for the Second Circuit found inconsistencies which escaped the trial judge. *United States* v. *Spangelet*, 258 F. 2d 338; *United States* v. *Zborowski*, 271 F. 2d 661; *United States* v. *McKeever*, 271 F. 2d 669. And, in *Gordan* v. *United States*, 313 F. 2d 582 (C. A. D. C.), cert. den'd, 374 U. S. 839, the majority thought the trial judge correct in finding no inconsistencies which might have been useful to the defense, but Chief Judge Bazelon, dissenting, found nine of them (313 F. 2d at 583-85).

[18] We know of only one case since the *Pittsburgh Plate Glass* case in which the court approved production of grand jury testimony directly to the defense. *DeBinder* v. *United States*, 292 F. 2d 737 (C. A. D. C.). But, thereafter, the same court has sanctioned only *in camera* inspection (*supra*, p. 14).

bers on the Mine-Mill staff, declared that "he was going to cut off Eckert's expense account, his salary, his phone bills" (R. 74-5); that later that day Travis, with the petitioners Dennis and Dichter, went to Eckert's office where Travis "told Eckert that he was fired, that his expense account was no longer" (R. 77); that Travis also declared that he was "placing Dichter in charge of the Cleveland office" and that the staff should henceforth report to Dichter and break off all contact with Eckert (R. 77).

Locke further testified (R. 80) that in April, 1948 "right after the meeting in Eckert's office" Eckert moved out and Dichter moved in; that Dichter held staff meetings (R. 80) "nearly every morning for a while"; that Dichter remained in Cleveland for two or three months "or maybe a little longer" (R. 80); and that during this period Dichter was in Cleveland "for the most part", making occasional visits to his home in New York (R. 80).

The thrust of this testimony was that Travis and Dichter were participants in a Communist ouster of Eckert from his union office, and that Dichter as part and consequence of the ouster immediately succeeded to Eckert's functions in Cleveland.

To controvert Locke's testimony concerning Dichter and further discredit Locke's veracity, the defense offered, through Mine-Mill's head bookkeeper, five of Dichter's expense vouchers covering the period in question (R. 772). The prosecution conceded the authenticity of the vouchers (R. 773), but objected to them as incompetent, and the trial court sustained the objection (R. 773).

The defense then made offer of proof (R. 792-93), indicating that the five documents (Def. Exs. Q-1 to Q-5 for Ident., inclusive) were Dichter's travel and expense vouchers for the period April 1 to June 15, 1948. They show that during these two and a half months Dichter

claimed per diem for being in Cleveland from April 7 to 9 and 15 to 17, inclusive, and from May 25 to 27, inclusive, and that at all other times he was in New York, Chicago, or Denver and not in Cleveland (R. 792-93). In other words, during the two months following the April 8th-9th meetings in Cleveland, Dichter was in Cleveland exactly nine days.

The court's rulings were erroneous, for these vouchers and ledgers were clearly admissible under the federal business records statute (28 U. S. C. 1732), which provides in part (*infra*, App. B) that:

> "In any court of the United States . . . any writing or record . . . made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business. . . ."

This Court has said that this statute should be "liberally interpreted so as to do away with the anachronistic rules which gave rise to its need and at which it was aimed." *Palmer* v. *Hoffman*, 318 U. S. 109, 115. As "routine reflections of the day-to-day operations of a business" the vouchers amply bore the stamp of "probability of trustworthiness" to which the statute looks. *Smith* v. *Bear*, 237 F. 2d 79 (C. A. 2). In other federal criminal cases, both prosecution and defense have made use of vouchers and similar records to show that a person was or was not at a given place at a given time, and such use has been held proper. *United States* v. *Hall*, 200 F. 2d 957 (C. A. 2); *Pulley* v. *United States*, 253 F. 2d 796 (C. A. 8); *Hines* v. *United States*, 220 F. 2d 381 (C. A. D. C.); *cf. United States* v. *Eisenberg*, 238 F. 2d 143 (C. A. 2).

The court below recognized the error of the trial court in not admitting the vouchers, but concluded that the error "is not fatal to the Government's case" because "the dates

on which Dichter was in Cleveland was not a point on which Locke's testimony was crucial" (*infra*, App. A1, p. 11a). But this is wrong on two counts. Materially, Locke's testimony was designed to show that the Communists in the union were determined to prevent compliance and that for two or three months from early April, Dichter was the instrument of that policy. The importance the prosecution attached to the Locke testimony about Dichter is shown by the extended emphasis given to it in the prosecutor's argument to the jury (R. 918-23).[19] Aside from that, documentary proof that Locke was so wide of the mark about Dichter's presence in Cleveland (holding meetings "nearly every morning") would have seriously impugned Locke's credibility. The exclusion of the vouchers was therefore highly prejudicial to all the accused, and especially Dichter.

(b) To controvert the inference of "parallelism" between Mine-Mill and Communist compliance policies, the defense offered a duly certified list compiled by the National Labor Relations Board, showing when compliance was effected by labor organizations (Def. Ex. for Ident. Y; R. 908-09). From this list—the accuracy and authenticity of which were unchallenged—it is apparent that a great many unions, both affiliated (AFL-CIO) and independent, had not complied until the latter part of 1948, that a number of large unions (including the Brotherhoods of Railroad Signalmen and Railroad Trainmen, the Textile Workers Union, the United Steelworkers, and the Congress of Industrial Organizations itself) complied in 1949 at about

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[19] For example, after pointing out that Dichter was appointed in Eckert's place, the prosecutor asked the jury, rhetorically, "what does he do?" (R. 920). On the basis of Locke's testimony, he then went on to tell the jury that Dichter "has his staff meetings———day after day———", with "this high functionary of the Communist Party" (Joe Brandt) in attendance (*ibid.*), over a period of two months (R. 921).

the same time that, or shortly after, Mine-Mill complied, and that the United Mine Workers and the International Typographical Union never complied at all. *Cf. Mine Workers* v. *Arkansas Flooring Co.*, 351 U. S. 62. The court sustained the prosecution's objection to the receipt of this document in evidence (R. 909). The issue was presented on appeal, but the court below did not pass on it in its opinion.

The document was plainly admissible under 28 U. S. C. 1733(b), and its exclusion was prejudicial because it would have tended to show that Mine-Mill's policies paralleled those of the trade union movement and to rebut the inference that Mine-Mill policies were controlled by the Communist Party. When the motivation or reasonableness of human action is in question, the behavior of others similarly situated is always relevant. *Twomley* v. *Central Park N. & E. R. R. R.*, 69 N. Y. 158. The principle is so elementary that case authority is scanty. But all reasonably probative testimony is admissible unless it falls within some exclusionary principle, and no such principle was involved here.

5. *"Vicarious Admissions"*. The trial judge charged the jury (R. 1013) that "participation of a defendant in a conspiracy must be determined from evidence relating to the particular defendant's own acts, his own declarations and his own conduct in connection with the actions and conduct of others", and that: "If it is established by the requisite degree of proof that a defendant was a member of a conspiracy, then any act or declaration of another co-conspirator, whether named as a defendant or not, which was made or done in furtherance thereof, would be binding upon all of the members of the conspiracy, even though such declarations or acts were made or done in the ab-

sence of a particular defendant and without previous authorization or subsequent ratification by him."[20]

Although the trial judge thus limited the second instruction quoted above to acts or statements "in furtherance" of the conspiracy, he rejected a defense request (R. 667 and 1030-31) that he specify those declarations and statements which were *not* in furtherance of the conspiracy and therefore could be considered by the jury only against the declarant.

The matter was of great importance to the trial since, as the lower court remarked (*infra*, App. A1, p. 8a), "the government's case here primarily consists of the testimony of eight witnesses who gave evidence of numerous meetings and conferences . . . during the period of the alleged conspiracy at which one or more of the appellants participated."[21] The record (R. 1126-34) discloses no less than 67 items of prosecution testimony (50 during the period of the alleged conspiracy), consisting of a statement made by or in the presence of one or more of the petitioners, each of which was originally received subject to an instruction that it could be considered only against the petitioner(s) directly involved, but subsequently (R. 671-72 and 1012-13) was submitted to the jury under the instructions quoted above.

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[20] Although similar charges are frequently given in the lower federal courts, the confusing and redundant character of the language is manifest, and has been condemned in the Second and Ninth Circuits. *United States* v. *Dennis*, 183 F. 2d 201 (C. A. 2); *Carbo* v. *United States*, 314 F. 2d 718 (C. A. 9). The charge in the present case was given over objection (R. 666-69), and the error is urged as grounds for this petition, though the errors described in the text are obviously more prejudicial.

[21] However, the court was mistaken in saying that eight witnesses gave testimony relating to the period of the alleged conspiracy. There were eight witnesses altogether, but the testimony of three of them (Locke, Petersen, and Bush) related only to the pre-conspiracy period.

Most of the statements alleged to have been made or heard by individual petitioners during the pendency[22] of the alleged conspiracy were plainly not in furtherance thereof. The witness Moralez, for example, testified to a discussion allegedly participated in by petitioner Skinner, concerning raising money for the relief of one Art Bary, a local Communist functionary who was ill (R. 450-53, 1130 (No. 33)). Indeed, it would be difficult to find as many as a dozen of these "vicarious admissions" which could possibly be deemed in furtherance of the conspiracy.

Nevertheless, the trial judge left it to the jury to determine whether or not particular acts or statements were "in furtherance". In this he was plainly in error.[23] *Baxa* v. *United States*, 381 U. S. 353, decided May 24, 1965. His ruling was likewise contrary to the decision of the Court of Appeals for the Third Circuit in *United States* v. *Guido*, 161 F. 2d 492, 494-95; see also *Fiswick* v. *United States*, 329 U. S. 211, 217; *Logan* v. *United States*, 144 U. S. 263, 309; *International Indemnity Co.* v. *Lehman*, 28 F. 2d 1 (C. C. A. 7), cert. den'd, 278 U. S. 648; Rule 63 of the *Uniform Rules of Evidence* of the National Conference of Commissioners on Uniform State Laws (1953).

Nor did the trial court properly apply the test set forth in the first instruction quoted above, for it allowed the jury to consider as proof that the defendants participated in the conspiracy statements made by persons (local Communist functionaries) not charged as or shown to be

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[22] Statements made prior to the conspiracy (R. 1126-34, Nos. 1-14 and 35), by definition, are not in furtherance of it. The trial court's charge (*supra*) with respect to pendency was woefully and, we urge, fatally inadequate, since it did not explicitly state that proposition, though earlier the judge had been more precise (R. 672).

[23] The Court of Appeals did not advert to this point in its opinion, although it was briefed and argued.

members of the conspiracy.[24] The judge also allowed the jury to consider (and considered himself, in passing on the motion for acquittal) as evidence that the petitioner Sanderson was a member of the conspiracy, declarations about Sanderson made in his absence (R. 472, 877, and 1099-1100). An instruction (No. 9, R. 1121) which might have mitigated the prejudicial error was refused.

6. *Accomplice Testimony.* The prosecution witness Lawrence was one of those indicted,[25] and two others (Fikes and Gardner) gave testimony which plainly showed them as accomplices. Nevertheless, the trial court refused to charge the jury (No. 5, R. 1120) that accomplice testimony "is to be received with the greatest care and caution", and gave no other instruction with respect to the consideration of such testimony.

The Court of Appeals (*infra*, App. A1, p. 20a) affirmed the trial court's action on the ground the instruction (R. 1022-23) cautioning the jury with respect to the testimony of former Communist Party members and "so-called informers" was sufficient.[26]. But this is unsound both in fact and law. Only one (Fikes) of the witnesses was an "informer". Nor does it make sense that a cautionary instruction, otherwise required, may be omitted because another cautionary, based on a quite different ground, is given.

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[24] E.g. Brandt (R. 76, 83, and 92); Bary (R. 239-40); Hall (R. 464 and 466-67); Johnson (R. 447); Hillman (R. 449); and Hudson (R. 433).

[25] Lawrence was one of the three accused who pleaded *nolo contendere*.

[26] The court of appeals stated (*infra*, App. A1, p. 19a) that none of the three witnesses was a co-defendant or co-conspirator. With respect to Lawrence, who was named as a defendant in the indictment, the court was mistaken. Fikes and Gardner were not indicted or named in the indictment as co-conspirators, but of course this does not determine that they were not accomplices, and on the government's theory of the case they surely were.

The general practice in the federal courts is to give the substance of the cautionary where, as here, the accomplice testimony is important or uncorroborated, and the decision below is in conflict with cases in three other circuits, wherein the refusal of such an instruction has been held reversible error.[27]

The error was plainly harmful here. For Fikes and Lawrence gave testimony strongly relied on by the prosecution to establish the *factum* of the conspiracy, and Gardner gave the only testimony relating to the period of the conspiracy which touched three of the petitioners (Dennis, Dichter and Sanderson). In this case, therefore, the accomplice testimony was "of crucial importance" and the failure to give the cautionary instruction was prejudicial error. See *Williamson* v. *United States*, 332 F. 2d 123, 132 (C. A. 5).

7. *Admission of Testimony Given at Previous Trial by a Witness Subsequently Deceased.* At the petitioners' first trial, testimony vital to the prosecution's case (302 F. 2d 5, 9-10, and *infra*, App. A2, pp. 25a-26a) was given by William Mason. The witness died prior to the second trial (R. 129-30) and, over the objections of the defense (R. 155-58), the transcript of Mason's testimony at the first trial was read to the jury (R. 280-408) on the authority of *Mattox* v. *United States*, 156 U. S. 237.

The rule of the *Mattox* case rests explicitly on the assumption that the accused has had full opportunity to cross-examine the witness at the earlier trial (156 U. S. at 242-

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[27] *Second Circuit*: *M'Ginniss* v. *United States*, 256 Fed. 621; *United States* v. *Masino*, 275 F. 2d 129, 133; *United States* v. *Persico*, 305 F. 2d 534, 536-38. *Fifth Circuit*: *Phelps* v. *United States*, 252 F. 2d 49, 53; *Dunn* v. *United States*, 318 F. 2d 89, 93; *Hull* v. *United States*, 324 F. 2d 817, 823-24; *Williamson* v. *United States*, 332 F. 2d 123. *District of Columbia Circuit*: *Freed* v. *United States*, 266 Fed. 1012, 1016; *Bishop* v. *United States*, 243 F. 2d 32, 33.

44). In the present case, petitioners were deprived of that right because of erroneous rulings at the first trial which (a) denied the petitioners access to Mason's grand jury testimony, (b) denied petitioners opportunity to examine Mason on *voir dire* with respect to documents possibly producible under 18 U. S. C. 3500, and (c) prejudicially restricted the scope of Mason's cross-examination.

(a) Mason gave testimony before grand juries prior to the indictments in both the present case and the *Travis* case, *supra* (R. 395-96), and at the conclusion of his courtroom testimony the defense moved for the production of his grand jury testimony, or in the alternative, for its examination *in camera*. The motions were denied (R. 401). We have previously argued (*supra*, pp. 12-16) that the trial court's denial of the grand jury motions was erroneous and in conflict with the practice in other circuits. If petitioners are right in that contention, they were denied full opportunity to cross-examine Mason by utilizing the grand jury transcript to impeach his trial testimony.

(b) At the first trial, although it was known that Mason had been interviewed by government attorneys on numerous occasions, no documents based on such interviews were produced to the court for scrutiny in response to the defense request for statements producible under 18 U. S. C. 3500. The prosecution represented that there were no such producible statements (R. 345-46).

Between the two trials, this Court and the court below ruled that under Section 3500 the government may not itself decide whether or not a statement is producible to the defense, but must produce all witness' statements to the court for scrutiny and ruling. *Campbell* v. *United States*, 365 U. S. 85 and 373 U. S. 487; *Bary* v. *United States*, 292 F. 2d 53. Accordingly, at the second trial, as part of the foundation for offering the record of Mason's testimony, the prosecution delivered a number of documents to the court

based on Mason's interviews with the government attorneys.

The trial court heard examination of six of the attorneys on *voir dire* (R. 161-207) and ruled (R. 215-16) that none of the documents was a "statement" within the definition of Section 3500(e). However, Mason was of course not available for *voir dire* at the second trial, and the review under Section 3500 was therefore fatally incomplete, for it is as essential for the witness to testify as it is for the agent. See the *Campbell* cases, *supra; Hilliard* v. *United States*, 317 F. 2d 150 (C. A. D. C.); *Williams* v. *United States*, 328 F. 2d 178, 181 (C. A. D. C.).

The lower court thought none of this prejudicial because it was ruled that none was producible under Section 3500 (*infra*, App. A1, p. 15a). But the issue of producibility could not be properly ruled on without Mason's *voir dire* testimony, which might have shown that they were in fact producible, as was the result in the second *Campbell* case (373 U. S. at 489-91).[28]

Furthermore, the trial court refused (R. 152-53) to call one of the government attorneys (Foley) who had interviewed Mason, on the ground that he was stationed in Washington, although other attorneys also stationed in Washington were called (R. 172, 183). The court of appeals affirmed this ruling under the mistaken impression[29] that the statement resulting from the Foley interview was made available to the defense (*infra*, App. A1, p. 16a). In fact it was not (R. 208-14), and the refusal to call Foley was especially prejudicial because Mason had testified at the *Travis* retrial that he thought Foley had taken "some notes" in the course of their interview (R. 214), so there

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[28] The prosecution representation at the first trial that there were no statements to be produced to the court also raises a question of due process. *Brady* v. *Maryland*, 373 U. S. 83, 87.

[29] The trial court had made the same mistake (R. 216).

was a substantial possibility that a producible statement based on the interview was in existence.

Finally, the trial court misapplied the standards of Section 3500(e) in ruling that none of the documents based on the Mason interviews was producible as a "statement". A memorandum by one of the interviewing attorneys (Worthington) based on his notes of the conversation was rejected (R. 215) because it had not been "exhibited" or "read" to or "adopted" by Mason—the test under Section 3500(e)(1)—when the real issue was whether it was "substantially verbatim" under 3500(e)(2). An outline by another government attorney (Crandall) which had been checked over by Mason (R. 172-82) and would seem to have been producible under clause (1) if not (2) as well, was excluded under the "work product" doctrine (R. 182-83)—a ruling inconsistent with the decision of the Court of Appeals for the District of Columbia in *Saunders* v. *United States*, 316 F. 2d 346, 349-50. Reports by FBI agents based on interviews with Mason were excluded without *voir dire* and with no explanatory statement by the trial judge (R. 139).

(c) At the first trial, the defense sought to impeach Mason's general credibility by showing that he, as a naturalized citizen and admitted ex-Communist, feared denaturalization and deportation and was therefore susceptible to pressures or suggestions that he give testimony favorable to the government (R. 373-80). The trial judge sustained objections to this line of cross-examination on the ground that the defense was entitled to show only that Mason had been "paid off some way, either financially or otherwise. . . ." (R. 377).[30]

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[30] The same issue had arisen when Mason testified in the *Travis* case, *supra*, and the trial court's similar ruling had been approved by the court of appeals. *Travis* v. *United States*, 269 F. 2d 928, 939-40. Accordingly in the present case the issue was foreclosed in the trial court, and the court of appeals did not reconsider the issue, although petitioners preserved the point. The issue was presented in this Court under the grant of certiorari in the *Travis* case (363 U. S. 801), but was not reached in the decision.

The court's ruling was unduly restrictive. The petitioners should have been permitted to show that Mason believed he might be favored or harmed according to the thrust of his testimony, whether or not his belief had a basis in fact. *Alford* v. *United States*, 282 U. S. 687, 691-94; *Farkas* v. *United States*, 2 F. 2d 644, 647 (C. A. 6); *Sandroff* v. *United States*, 158 F. 2d 623, 628-30 (C. A. 6); *Spaeth* v. *United States*, 232 F. 2d 776, 778-79 (C. A. 6).[21]

Furthermore, the evidence otherwise indicated that government agents may have planted the fear of denaturalization in Mason's mind. Although he had been naturalized in 1939, he was interrogated in February, 1952, by an agent of the Immigration and Naturalization Service about his past Party membership (R. 373-75) and the matter was again referred to when he was first interviewed by an FBI agent two months later (R. 146-47). At least by July, 1953, when Mason was still a member of the Executive Board of Mine-Mill, he was supplying information to the FBI (R. 375).

For all the foregoing reasons, petitioners were deprived of full opportunity to cross-examine Mason at the first trial and therefore the admission of the record of his testimony at the second trial was prejudicial and a denial of petitioners' constitutional right of confrontation.

8. *Insufficiency of the Evidence.* As indicated in the statement of the case (*supra*, pp. 5-6), the essence of the charge is that in the summer of 1949, when the executive board of Mine-Mill decided to comply with the Taft-Hartley filing requirements, the petitioners agreed that those of them who were officers should file false affidavits. As evi-

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[21] A number of comparable state court decisions are summarized in 62 ALR 2d 610 at 639-42 with the generalization, at 639, that: "It is prejudicial error to rule out cross-examination as to expectation of leniency merely because it was not based on any direct or implied promise from the prosecuting authorities, or on any substantial foundation."

dence that such a conspiracy was entered into, the court below relied primarily (*infra*, App. A1, pp. 4a-7a) on statements alleged to have been made at that time by or in the presence of petitioners Travis and Wilson.[23]

With respect to Travis, the lower court found (*infra*, App. A1, p. 7a) crucial significance in his public statement of resignation from the Communist Party (G. Ex. 8, R. 309-12), coupled with Mason's testimony that Travis had told him that the statement had been "cleared with Ben Gold and the Party people in New York" (R. 306). As regards Wilson, the court stressed the testimony of Fikes (R. 429-33) and Lawrence (R. 465-72) concerning a meeting at the Mine-Mill office in Bessemer, Alabama, shortly after Wilson's return from the July, 1949 Board meeting, at which one Hudson (a local Communist Party official) stated in Wilson's presence that the Mine-Mill officers who signed affidavits would write letters of resignation from the Communist Party, but (R. 432) this "would be on paper, only, a piece of paper—and that they would continue to read the Party press, give donations. . . ." The court below, in the footnote to its opinion quoting this statement (*infra*, App. A1, p. 6a, n. 2), erroneously attributes it to Wilson!

Even if this egregious error be disregarded, and it may somehow be assumed that Wilson "adopted" Hudson's statement despite Wilson's own contrary remarks (R. 432, 470-71), all this is still far from sufficient to establish the

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[23] There is no evidence linking petitioners Dennis, Dichter and Skinner (none of whom was then an officer, though Dennis soon thereafter became one) with the formation of the conspiracy. Sanderson was not then (or later) an officer, but was assistant to the President and attended the July, 1949 executive board meeting at which the decision to comply was made. The only evidence linking Sanderson with the formation of the conspiracy (R. 472) concerned a conversation at which Sanderson was not present.

elements of conspiracy.[33] The fatal lack is evidence of any concert or agreement among the defendants. Even if it be granted that the evidence supports an inference that Travis and Wilson were planning themselves to file false affidavits, there is no evidence that any of the other petitioners were privy to their plans or that they were privy to each other's.

This Court has recently reaffirmed the rule that, under the federal conspiracy statutes, it must be shown that those accused shared knowledge of the unlawful agreement. *Ingram* v. *United States*, 360 U. S. 672. In this case, evidence of mutual knowledge and purpose is wholly lacking.

It may be said that Travis was shown to be conspiring with Ben Gold and others in New York, and Wilson with Hudson and others in Bessemer. If this be assumed, the upshot is two distinct conspiracies with no common members, neither of which is charged in the indictment. Such a profound variance from the indictment charged would unquestionably be fatal to the judgment. *Kotteakos* v. *United States*, 328 U. S. 750; *cf. United States* v. *Agueci*, 310 F. 2d 817, 827-28 (C. A. 2), cert. den'd, 372 U. S. 959; *United States* v. *Borelli*, 336 F. 2d 376 (C. A. 2), cert. den'd, *sub nom. Cinquegrano* v. *United States*, 379 U. S. 960.

Apart from the intrinsic insufficiency of the evidence, the petitioners were seriously prejudiced by the trial judge's instructions to the jury with respect to the standards of

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[33] Other matters mentioned by the lower court (*infra*, App. A2, pp. 28a-29a) are intrinsically quite innocent ("prolonged association", "common knowledge of the problems presented by the Taft-Hartley Act", and common association with Mine-Mill). Common membership in the Communist Party is plainly insufficient, and can only serve to corroborate. There was no evidence of a "steering committee" at the second trial.

sufficiency and the elements of the offense charged.[34] The defense submitted proposed instructions (Nos. 7 and 11, R. 1120-22) based on the rule affirmed in the *Ingram* case, *supra*, which were intended to call the jury's attention to the necessity of finding mutual knowledge (of the plan to file false affidavits) as a basis for a guilty verdict. The trial judge refused the instructions, and gave none that served this essential purpose.

Finally, the trial judge refused to apply to the charge against Dichter the "isolated transaction" rule applied in the Second Circuit. *United States* v. *Bentvena*, 319 F. 2d 916, 927; *United States* v. *Agueci*, 310 F. 2d 817, 835-36, cert. den'd, 372 U. S. 959; *United States* v. *Aviles*, 274 F. 2d 179, 189-90. There was but one piece of evidence against Dichter relating to the period covered by the conspiracy.[35] The witness Gardner testified to a conversation with Dichter in 1955 (six years after the alleged formation of the conspiracy), the content of which was wholly irrelevant to the charge but which if true indicated that Dichter was at that time a member of the Communist Party (R. 576-78). Both as a matter of general law and under the rule as precisely phrased in the Second Circuit, this single item of testimony was quite insufficient to send Dichter's case to the jury.

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[34] As indicated above under the first point (*supra*, p. 11, n. 9), the trial judge failed to charge that the jury must find fraud or fraudulent intent, and thus a vital element of the crime which the indictment purports to charge was never found by the jury.

[35] There was also the testimony of Locke relating to Dichter's activities in 1948 (a year before the conspiracy is alleged to have been established), which Dichter sought to controvert by the travel and per diem vouchers erroneously excluded from evidence (*supra*, pp. 16-19), and testimony by another witness regarding Dichter's presence at a Communist meeting in Denver in May, 1948 (R. 235-36).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Judgment Below

JUDGMENT

Twenty-First Day, March Term, Monday, April 26th, 1965.

Before Honorable Alfred P. Murrah, Chief Judge, and Honorable John C. Pickett and Honorable Delmas C. Hill, Circuit Judges.

(Case No. 7621)

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Colorado and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby affirmed.

It is further ordered by this court that Raymond Dennis, appellant, surrender himself to the custody of the United States Marshal for the District of Colorado, in execution of the judgment and sentence imposed upon him, within ten days from and after the date of the filing of the mandate of this court in said district court.

(The above judgment was entered in cases Nos. 7622, 7623, 7624, 7625 and 7626.)

APPENDIX A1

Opinion Below (346 F. 2d 10)

Before MURRAH, Chief Judge, and PICKETT and HILL, Circuit Judges.

MURRAH, Chief Judge. Appellants appeal from a judgment of conviction on retrial after reversal of convictions on prior trial. See Dennis v. United States, 302 F. 2d 5.

On the prior appeal we sustained the validity of the indictment and the Court's denial of all pre-trial motions. We reversed the case for admission of hearsay testimony, but sustained the sufficiency of admissible testimony to support the verdict of the jury as to all of the appellants except Durkin and Powers. As to them, we held the evidence insufficient to support conviction.

This appeal perpetuates the attack on the indictment, the constitutionality of 9(h) of the National Labor Relations Act, and the bar of the Statute of Limitations, but these points are not argued. The appellants do sharply challenge the sufficiency of the evidence on retrial to establish a conspiracy to violate § 9(h), but argue if a conspiracy is established, it is at variance with the one charged in the indictment. The contention is that the evidence on retrial is decisively different because some of the witnesses who testified in the former trial did not testify in this trial, and some who did gave materially different testimony. Several trial errors relating to the admission of evidence and instructions to the jury are reassigned in different trial context.

On the sufficiency of the evidence in this appeal to prove the alleged conspiracy the Government adheres to its original theory to the effect that before and after the enactment of § 9(h) the Communist Party was opposed to its non-communist affidavit provisions; that the appellants were at once members of the Communist Party subject to its

discipline and officers or functionaries in the "Mine Mill" Union; that the Communist Party dictated the Union's opposition and consequent refusal to comply with the provisions of § 9(h); that in the Summer of 1949 the Communist Party changed its policy to comply with the provisions of the Act, and the Union, acting through the appellants as its officers, obediently changed its policy to one of compliance; and that pursuant to this changed policy, some of the appellants filed false non-communist affidavits with the knowledge and guilty intent of all.

It does not seem to be disputed that during all or part of the time laid in the indictment, all the appellants were members of the Communist Party and also officers or staff members of "Mine Mill";[1] that the Communist Party and the Union both opposed compliance with § 9(h), and at first the Union refused to comply. That thereafter the Communist Party changed its policy to advocate compliance with the Act, and the Union, acting through the appellant-directors, complied with the Act by filing non-communist affidavits, some of which were false. But, the appellants earnestly contend that this parallelism of policy and identity of membership falls far short of proving a conspiracy among the appellants to defraud the Government by filing false non-communist affidavits to effectuate Union compliance with § 9(h). We are reminded that the

[1] Before and after the commencement of the alleged conspiracy and until 1955, Travis was Secretary-Treasurer of the Union; Wilson was first International Representative, later Executive Board Member, and then Vice President of the Eastern territory. Sanderson was a member of the office staff and most of the time acted as Assistant to the President. VanCamp was Board Member of District 3 and was succeeded by Dennis. Dichter and Skinner were International Representatives. When in 1955 Pezzati succeeded Travis as Secretary-Treasurer, Dichter succeeded him as Board Member from District 6. Dennis was first an International Representative and later succeeded VanCamp as Board Member from District 3.

gist of the offense charged is the unlawful agreement which is not proved by the factum of filing false affidavits by one or more of the appellants. See *United States* v. *Borelli*, 336 F. 2d 376, 384.

The Government pins its case of unlawful agreement on the prolonged association of the appellants as members of the Party and officers of the Union, dedicated to a common cause, *i.e.*, compliance with § 9(h), by the conscious filing of false non-communist affidavits.

In the former appeal we were of the view that quite apart from the excluded testimony, the statements made by appellants Travis and Wilson relative to a change in the Party policy; the record proof that appellants as Party Members subjected themselves to Party discipline; the evidence that a "Steering Committee", "of which some of the appellants were members" transmitted the "Communist Party program, decisions, to the Union * * *" for implementation; appellants' common knowledge of the problems presented by the Taft-Hartley Act; and the common bonds existing between appellants as members of the Communist Party and as officers and employees of "Mine Mill", authorized the jury's findings that the alleged conspiracy laid in the indictment was consummated, *i.e.*, see *Dennis* v. *United States, supra*, page 10.

We then proceeded to analyze the evidence to determine its sufficiency to justify the jury's findings of conscious participation on the part of the individual appellants. In doing so we observed the well known and salutary rule that "mere knowledge, approval, or acquiescence in the object or purpose of a conspiracy does not make one a conspirator". *Id.* p. 12. We thought that while the evidence was unquestionably sufficient to show that Durkin and Powers were active members of the Communist Party, it was insufficient to connect them with the conspiracy. We reversed the case as to them with directions to grant the motion for acquittal.

After reviewing the record in some detail, we thought the evidence sufficiently connected Dichter, Sanderson and VanCamp with the conspiracy to justify the jury's verdict. VanCamp was acquitted on retrial.

Without tediously analyzing the proof relating directly to the appellants Dennis, Skinner, Travis and Wilson, we were of the view that their "individual acts and declarations were forcefully demonstrative of their culpable association in the conspiracy." (Former appeal, p. 10.)

If the evidence was sufficient to convict on the former appeal, the same evidence is, of course sufficient now, and the only question of sufficiency then is whether, as appellants contend, it was materially different and decisively less convincing.

Witness Mason died before retrial, and his testimony (Former appeal, p. 9) concerning appellant Travis was perpetuated under the rule of *Mattox* v. *United States*, 156 U. S. 237; *West* v. *Louisiana*, 195 U. S. 258.

As to appellant Wilson, it is argued that testimony in this trial tending to connect him with the conspiracy is materially different from the former. Specifically, witness Fikes' testimony in the former trial concerning Wilson's incriminatory statements (made at a meeting in Bessemer, Alabama, in the Summer of 1949) to the effect that the letters of resignation from the Communist Party "wouldn't mean anything and would be phoney" was not repeated on retrial. Instead, Fikes and Lawrence (a member of the Communist Party who attended the Bessemer meeting but did not testify in the first trial) testified concerning the meeting that Wilson was opposed to policy change, and they gave no testimony concerning any statement by him that the resignations from the Party would not be genuine. Witness Lawrence is represented as quoting Wilson to the effect that "none of the Executive officers could have any connection with the Party, that is, they could not attend meetings, meet with the Party officials or make contribu-

tions directly to the Party." The testimony of these witnesses was literally different, but the import of the language used was the same. It was susceptible to the inference that Wilson knew of and consented to the change in Party policy and actively participated in the effectuation of it as a Union officer.[2]

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[2] At the Bessemer meeting in the Summer of 1949, attended by Hudson (a Communist Party functionary), Lawrence, Fikes, Wilson, Hall (a local Party official) and others, Fikes testified that Hudson (who was not a member of the Union) stated, "decision had been made by the Party that officials of the union (Mine Mill) were to comply with the Taft-Hartley law. * * * So he (Wilson) said that they would sign a letter of resignation to the Party, and that they would see that this got into New York—the letter of resignation from the party. But they would continue—that this would be on paper only, a piece of paper—and that they would continue to read the Party press, give donations and it was of utmost—it should be utmost in everybody's mind that the security was the most important thing at this time, because they had to sign this letter of resignation from the Party and was supposed to be out where they could sign the affidavit. * * * he said that he had been to a Board meeting and also met with Party people, and that he was opposed to signing the affidavit on principle, but something had to be done. They had to do something to save the Union. And so therefore he went along with this, that they should resign, write a letter of resignation and should sign the affidavit. * * * Also he spoke of a liaison" between the Party and the Union.

Lawrence testified that at the same meeting "Mr. Wilson reported that the Executive Board had taken action to comply with that provision of the Taft-Hartley Law involving the signing of non-Communist affidavits. He said that all of the Executive Officers—that is, those who, under the law, were to sign the affidavits—had to resign from the Communist Party, that in all except one case this took the form of signing letters which were deposited with local functionaries in each area, in which they resigned from the Communist Party and that in the person of the Secretary-Treasurer (Travis) it was a matter of public resignation.

"He went on to say that from this point on none of the Executive Officers, or none of the Taft-Hartley-ites, as I believe the term can be used, could have any connection with the Communist Party, could

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At the time of the Bessemer meeting in the Summer of 1949, Travis and Wilson were officers of the Union. Travis was Secretary-Treasurer and Wilson was a member of the Board. In accordance with the understanding at the meeting, Travis soon thereafter publicly announced his resignation from the Party in adherence to clearly articulated Party-Union policy. (See Mason's testimony, Former appeal, p. 9).

Appellants suggest that the Government's case against each of the appellants is made up of uncorroborated statements of witnesses concerning incriminating statements by the appellants or by others in their presence, and these statements or admissions are wholly inadequate as a matter of law to prove the offense charged.

Uncorroborated statements or admissions are insufficient to prove guilt. See *Opper* v. *United States*, 348 U. S. 84; *Yarbrough* v. *United States*, 309 F. 2d 936; *Wong Sun* v. *United States*, 371 U. S. 471; Annotation 45 A. L. R. 2d 1317; *Krulewitch* v. *United States*, 336 U. S. 440. But, incriminating statements made by one co-conspirator during the pendency and in furtherance of a conspiracy are admissible as an exception to the hearsay rule once a conspiracy

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not attend meetings, could not—let me go over that again—that they could not attend meetings, they could not meet with Party officials, and could not make contributions directly to the Communist Party.

"But insofar as Staff members were concerned, there would probably be coordination of their Party activities from that point on primarily within the Union rather than in terms of a series of connections with local Party organizations, but that the details had not yet been worked out.

"But he had indicated that there would be some change in terms of less connection and also in terms of money going into a different area than the local party organizations. This is my best recollection of his report."

has been shown.[3] See *Wong Sun* v. *United States*, *supra*, citing Developments in the Law-Criminal Conspiracy, 72 Harv. L. R. 922, 98[illegible]0; *Fiswick* v. *United States*, 329 U. S. 211; *Krulewitch* v. *United States*, *supra*; *Gay* v. *United States*, 322 F. 2d 208; and *Cleaver* v. *United States*, 238 F. 2d 766; *Briggs* v. *United States*, 176 F. 2d 317.[4] This practice has often been criticized (See Justice Jackson specially concurring in *Krulewitch*, *supra*, p. 445), but has never been rejected. See Developments in the Law—Criminal Conspiracy, *supra*.

True, the Government's case here primarily consists of the testimony of eight witnesses who gave evidence of numerous meetings and conferences at different times and places during the period of the alleged conspiracy at which one or more of the appellants participated. This testimony was admitted in evidence under conventional cautionary instructions to the effect that the statements were not binding on any of the appellants not present when made. These instructions were given repeatedly upon suggestion of defense counsel. At the conclusion of the Government's case, the jury was instructed, "If it now appears from the evidence to your satisfaction beyond a reasonable doubt that a conspiracy existed and that a defendant was one of

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[3] Mr. Justice Black, speaking for the Court in Krulewitch v. United States, supra, states: "There are many logical and practical reasons that could be advanced against a special evidentiary rule that permits out-of-court statements of one conspirator to be used against another. But however cogent these reasons, it is firmly established that where made in furtherance of the objectives of a going conspiracy, such statements are admissible as exceptions to the hearsay rule. This prerequisite to admissibility, that hearsay statements by some conspirators to be admissible against others must be made in furtherance of the conspiracy charged, has been scrupulously observed by federal courts."

[4] Some were admitted to show Party-Union policy prior to the alleged formation of the conspiracy, and they were, we think, competent to lay the foundation for the agreement.

the members, then the acts knowingly done and the statements knowingly made after the formation of such conspiracy by any person likewise found to be a member may be considered by the jury as evidence in the case as to the defendant found to have been a member, even though the acts and statements may have occurred in the absence and without the knowledge of the defendant, provided such acts and statements were knowingly done and made during the continuance of such conspiracy."[4]

Compliance with the rule against the admission of hearsay until a conspiracy has been shown by some independent evidence has been observed by according the trial judge wide latitude in the procedural order of proof. See *Briggs v. United States, supra.* The only protection accorded the absent defendant to be charged with the testimony is the conventional cautionary instruction which the trial court freely used in this case. This practice has also been criticized as "unmitigated fiction", See Justice Jackson specially concurring in *Krulewitch* v. *United States, supra,* but it has been traditionally accepted as the only available method of proof for getting at surreptitiously conceived unlawful agreements.[5]

Appellants say that the trial court erroneously departed from his limiting instructions in the general instructions to the jury, but we do not think so. The jury was told they must first determine the existence of the conspiracy charged, and if they entertained a reasonable doubt of the conspiracy as charged, their task was at an end, and they should acquit all defendants. But, if on the other hand, they were convinced beyond a reasonable doubt of the

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[4] Attorneys for the petitioners respectfully direct this Court's attention to the omission at the end of this quotation in the opinion of the court below, obviously by inadvertence, of the clause: "and in furtherance of an object or purpose of the conspiracy" (R. 672).

[5] See Goldstein, Conspiracy to Defraud the United States, 68 Yale L. J. 405 (1959).

existence of a conspiracy, they should then proceed to consider which, if any, of the appellants were members of it. And, they should determine the participation of any defendant in the conspiracy from the evidence relating to his own acts, declarations and conduct with the actions and conduct of others; that guilt was personal and individual, but once a conspiracy was formed each member became the agent of the other in all things done or said in the promotion or furtherance of the unlawful purpose; however, declarations made not in furtherance of it were not binding on any other members.

The jury was told that mere membership in the Communist Party or affiliation with it or the filing of non-communist affidavits with the National Labor Relations Board was not in itself sufficient to show that any particular defendant was in fact a member of the conspiracy. These instructions clearly and succinctly stated the law of the case and were entirely consistent with the trial court's cautionary instructions.

In the former appeal we approved the procedure by which hearsay statements of alleged co-conspirators may be received as evidence after some evidence aliunde from which the jury could find the existence of a conspiracy and the speaker's complicity in it. See Former appeal, p. 10 and *Briggs v. United States, supra.* Indulging in this concept of trial procedure and order of proof, we were of the view that the evidence taken together was factually sufficient to support the alleged conspiracy. The evidence in this appeal is not materially different.

Appellants complain of the exclusion of business records to prove alibi and discredit prosecution testimony. Specifically, they complain of the refusal of the trial court to admit the expense vouchers of Dichter to show that he was not in Cleveland all the time to which witness Locke testified. (Former appeal, p. 11).

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Locke's expense vouchers were admitted to impeach his testimony to the effect that Travis fired Eckert on April 8, and Dichter took over the office management in Cleveland. Locke's vouchers showed that Eckert continued to approve his expense vouchers until about the middle of May. Later the defense offered Dichter's expense vouchers for the months of April and May, apparently not as a part of cross-examination of Locke, but to impeach his testimony that Dichter took over management of the office for the next "month or two" and that he "had meetings nearly every morning for a while". When the exhibits were offered, Government counsel stated that he understood the purpose of the vouchers was to show "where [Dichter] wasn't at a particular time". Counsel agreed. On this premise the Government objected. The matter was then passed until recess when the offer was renewed "to controvert the testimony of the prosecution witness, Ralph Locke * * * about what was going on in Cleveland beginning around April 8 or 9, 1948."

The Court sustained the objection to the offer of proof without stating any grounds. No point was made of the authenticity of the vouchers or that they were not a part of the business records of the Union within the meaning of 28 U. S. C. 1732. And, the vouchers may well have been admitted into evidence to impeach Locke's testimony concerning specific dates, but the dates on which Dichter was in Cleveland was not a point on which Locke's testimony was crucial. Failure to admit the vouchers is not fatal to the Government's case.

Appellants also complain of the refusal of the Court to lift the lid of secrecy on the grand jury proceedings. The Court's refusal was based upon lack of showing a "particularized need". In the former appeal we sustained the trial court's ruling in view of "the availability of the transcripts of testimony relating to the same subject matter given by many of the Government witnesses before other tribunals and the voluminous statements of such witnesses

produced under 18 U. S. C. A. § 3500". (Former appeal, p. 14).

It is suggested that the availability of other material should not be grounds for denying access to the grand jury proceedings, and we agree. Indeed, it may very well disclose inconsistencies indicating the particularized need. Certainly the trial court ought not decline an "in camera" suggestion in face of the appearance of inconsistencies which might lead to disclosure of further inconsistencies in grand jury proceedings.

Some courts have required judicial inspection of grand jury testimony upon the request of a party against whom a witness has given incriminating testimony. See *U. S.* v. *Hernandez*, 290 F. 2d 86; *U. S.* v. *Giampa*, 290 F. 2d 83. Other courts have required "in camera" inspection whenever it appears "that the testimony of an important prosecution witness at trial may be inconsistent with his testimony before the grand jury." *Simmons* v. *United States*, 308 F. 2d 324; *Harrell* v. *United States*, 317 F. 2d 580. We have been more reluctant to require "in camera" inspection in the absence of some indication of inconsistency. *Travis* v. *United States*, 269 F. 2d 928, 944; *Bary* v. *United States*, 292 F. 2d 53, 56. See also *Berry* v. *United States*, 295 F. 2d 192; *Herzog* v. *United States*, 226 F. 2d 561.[6] But, we have left no doubt of the

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[6] The federal courts have been roundly criticized for their "paltry interpretation" of the statutory law and federal rules of discovery. Chief Justice Roger Traynor has recently accused federal judges of continuing "to bar discovery upon the rationalization, at odds with the apparent intention of the draftsmen of the rules, that failure to authorize discovery is an implied prohibition of it. * * * the federal courts fail to exercise their inherent power to foster a wholesome integration of discovery procedures into the judicial process." "Ground Lost and Found in Criminal Discovery", Vol. 39, N. Y. L. R., April 1964, pp. 228, 238, 240. See Jones v. Superior Court of Nevada County, 372 P. 2d 919. See also 111 U. Pa. L. R. 1154, 1181-95.

inherent power and the inescapable duty of the trial court to lift the lid of secrecy on grand jury proceedings in aid of the search for truth. The court should not hesitate to inspect and to disclose any inconsistencies if it is likely to aid the fair administration of criminal justice through proper cross-examination and impeachment. In determining variances or inconsistencies we should remember that flat contradictions are not the only test of inconsistency. Omissions of fact or even contrast in emphasis or different order of treatment may be relevant to the process of testing credibility of a witness' trial testimony. See *Clancy* v. *United States*, 365 U. S. 312, 316, quoting *Jencks* v. *United States*, 353 U. S. 657, 667.

Our affirmance is based primarily on the proposition that inasmuch as the witnesses were thoroughly and competently cross-examined on numerous other relevant judicial and extra-judicial statements without manifest inconsistency, it is safe to assume that the grand jury proceedings would not have disclosed anything of impeaching significance. While it would have been safer to have inspected the grand jury testimony, in these peculiar circumstances we remain unwilling to say the trial court committed reversible error by refusing the "in camera" inspection.

Complaint is also made of the Court's interpretation and application of 18 U. S. C. §3500. This evidentiary statute has been authoritatively interpreted to require full disclosure by the Government to the Court of all questionable documents relating to the subject matter of a witness' testimony. But, "Final decision as to production must rest as it does so very often in procedural and evidentiary matters within the good sense and experience of the District Judge * * * subject to limited review of the appellate courts." See *Palermo* v. *United States*, 360 U. S. 343, 353; *Campbell* v. *United States*, 365 U. S. 85, 373 U. S. 487; *Clancy* v. *United States*, 365 U. S. 312;

Bary v. *United States*, 292 F. 2d 53; *Ogden* v. *United States*, 303 F. 2d 724; *United States* v. *Crosby*, 294 F. 2d 928. In determining the issue of producibility the trial court may, and sometimes must, resort to extrinsic evidence bearing not only on the nature of the document but the peculiar circumstances in which it was made. The need for and the extent of extrinsic evidence bearing on producibility must be left to the wise discretion of the trial judge. "This is a problem of the sound and fair administration of a criminal prosecution and its solution must be guided by the need, reflected in so much of our law of evidence, to avoid needless trial of collateral and confusing issues while assuring the utmost fairness to a criminal defendant." See *Palermo* v. *United States*, *supra*, 355; *Saunders* v. *United States*, 316 F. 2d 346. The appellate function on review is to examine the perpetuated withheld document and voir dire inquiry, if any, to determine whether full consideration has been given to the issue and finally whether the trial court's determination is clearly erroneous. See Campbell II, *supra*, 493.

Specifically, appellants say that Mason's testimony was rendered inadmissible because of the lack of voir dire in the first trial. The complaint rests on these facts. Several of Mason's statements were delivered to the defense under § 3500 for use in the first trial. In response to a question from defense counsel the Government prosecutor stated in effect there were no other "statements", and defense counsel accepted Government counsel's word. At the second trial, additional material in the form of interview notes, reports and memoranda were submitted to the Court.

The appellants insist that they were misled by the "ambiguous representations" of Government counsel, and relying thereon did not voir dire Mason to the prejudice of their right to full cross-examination; that Mason's record testimony should, therefore, be excluded in the second trial. For whatever reason, there was no voir dire

of Mason although he was thoroughly and competently cross-examined based upon numerous statements produced pursuant to interviews with Government agents or counsel.

If none of the additional documents submitted at the second trial can be said to be producible § 3500 "statements" for purposes of cross-examination of witness Mason, no prejudice can result from Government's failure to submit them to the Court or lack of Mason voir dire with respect to them. Prejudice, if any, must inhere in the nature of the documents withheld not in the fact of withholding. All investigators or attorneys, except one, who interviewed Mason were called by the Government to testify concerning the nature of the particular interview and resulting interview report or memoranda. Cross-examination of these interviewers failed to indicate that voir dire of Mason on the first trial on the subject matter of the interviews or the nature of the resulting reports would have induced production of any of the submitted documents.

The trial court made specific findings with respect to each of the Mason interviews. In each instance it found that the report, trial memorandum or outline, as the case may be, was made from the memory of the interviewer, from notes made at the time of the interview but destroyed in good faith after dictation of the report or memorandum, or that the trial outline or memorandum had been composed from several sources of information including records of other trials involving some of the same witnesses and defendants. The Court specifically found that none of the documents in question was ever submitted to Mason for signature or approval. With particular reference to the Crandall "outline" the Court found that it had been prepared from a transcript of Mason's testimony at the first Travis trial in which present defense counsel had participated. Addressing defense counsel during argument on the matter the Court stated, "So this outline was

prepared in testimony that was elicited in open court in your presence in which you participated and it was in no sense a statement under 18-3500." The trial court's careful findings with respect to the documents resulting from Mason interviews are not clearly erroneous, and its ruling thereon must be sustained.

The only Mason interviewer (Foley) not produced for voir dire interviewed him in 1954 apparently regarding a National Labor Relations Board matter. This interview resulted in an affidavit by Mason which was made available to defense counsel in the former trial and redelivered in the present trial. From interrogation of Government counsel the Court was satisfied the affidavit was the only document relating to the interview of Mason by Foley. In these circumstances the trial court's refusal to recall the interviewing attorney from Washington for voir dire was not error. We conclude that Mason's testimony was not improperly perpetuated.

All of the other documents relating to the subject matter of the testimony of all other witnesses delivered to the Court for determination of producibility under § 3500 were carefully considered by the Court pursuant to the extensive voir dire examination of both the witnesses and with two exceptions (to be noted) the interviewing Government agents. With respect to each identified document or group of documents the responsible interviewing agent testified that he prepared the report, memorandum or outline either from memory or from fragmentary notes, including "key words and phrases", or that the memorandum or outline was composed from information obtained from the testimony of witnesses in other similar trials and in no instance were any of the documents submitted to or in any way adopted by the related witness. Some of the interviewers who took notes of the interview testified that the notes were destroyed in good faith after dictation of a memorandum. Each witness also testified that although in some

instances the interviewer took notes, they were never submitted for signature or approval nor was he in any way called upon to adopt the notes or any other document made pursuant to the interview.

One interviewer testified by affidavit (admitted into the record without objection) that he prepared a memorandum of his interview with witness Gardner from fragmentary and abbreviated notes of the matters discussed, but they in no sense purported to be verbatim remarks of Gardner nor were they ever read to him nor was he called upon to approve or affirm them. The notes were appended to the affidavit for the record.

Appellants complain of the failure of the trial court to require the attendance of one interviewing attorney for purposes of voir dire. This Government attorney for the Immigration and Naturalization Service interviewed witness Fikes apparently concerning some matter relating to a deportation hearing. When defense counsel suggested the Court require the interviewing attorney be produced for voir dire, the Court inquired of witness Fikes whether he had made any written statement of any kind to this interviewer. Fikes answered he had not and moreover no questions were asked concerning any of the appellants in this case. There was no further cross-examination of any kind and the trial court rightly declined to produce the witness.

Based upon voir dire testimony of all responsible interviewers and related witnesses and an examination of each document or group of documents, the trial court concluded that none of the withheld documents was a statement within the definition of § 3500. His conclusions were based upon specific findings to the effect that none of them was ever signed or otherwise adopted or approved by the witness nor was it a "verbatim recording" of the interview of the witness. Appellants do not now contend that any of the documents were signed or otherwise adopted or approved

by the witness within the definition of § 3500(e)(1). The contention is to the effect that the trial court simply stopped there and did not proceed to determine whether the documents or any of them were producible under § 3500(e)(2) as "other recording * * * which is substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement".

We do not think that failure of the trial court to couch its findings in the verbatim language of the statute is any indication of its failure to consider the producibility of the documents as "verbatim recitals" of the oral statements of the witnesses. Appellants were undoubtedly contending for production under either subsection of § 3500, and the trial court's inspection and ruling on each document was undoubtedly based upon producibility under either subsection of the statute. In any event we have examined all of the excluded material certified here under seal for the purpose of determining producibility of any of the documents as contemporaneous "verbatim recitals" of oral statements of witnesses.

Our independent examination shows that the trial court did produce a number of statements without excision. Much excised material was produced. The documents and excisions which were withheld related in the main to members of the Communist Party, many of whom are unrelated and unidentified with this case. Others related to activities of the appellants wholly unrelated to these charges. The withheld documents were couched in the vernacular of "Informant stated", "Informant advised" or "Informant related", but none we have examined can be said to be a verbatim recital within the meaning of § 3500(e)(2). We think they were properly withheld.

During the course of the trial, the defense moved to strike the testimony of witnesses Lawrence, Fikes, Locke and Gardner in consequence of the destruction of the inter-

view notes after preparation of memoranda based thereon. These motions were inspired by footnote 5 of Campbell II, *supra*, p. 491, where the Court posed but did not answer the issue whether "If the notes were producible under the Act, their destruction gives rise to sanctions under subsection (d) or permits secondary evidence of their contents to be produced". We have no occasion to decide this issue since the question itself presupposes producibility of that which was destroyed. Certainly we should not order the production of an otherwise non-producible document on the chance its non-existent progenitor might have been producible.[7] While the notes are not available for inspection to determine producibility, examination of the memoranda which are based on the notes affords no basis for surmising that the antecedent notes were verbatim recitals of oral statements of the witnesses. On the contrary they indicate quite clearly to us that the notes were not producible so as to give rise to the question of sanctions under subsection (d). In these circumstances we think the trial court properly denied the motions to strike.

Finally, appellants complain of the refusal of the trial court to give their requested cautionary instruction on "accomplice testimony". The request is based upon the assumption that the witnesses Fikes, Lawrence, and Gardner, although not co-defendants or co-conspirators, were within the definition of an "accomplice" because they were in "some way concerned or associated in the commission of the crime". See *McLendon* v. *United States*, 19 F. 2d 465, 466; *Johns* v. *United States*, 227 F. 2d 374; *Cleaver* v. *United States*, 238 F. 2d 766.

It may be conceded *arguendo* that these witnesses came within the category of an accomplice by virtue of their

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[7] It is admitted that the notes were destroyed in good faith in accordance with established practice of the FBI.

membership in or affiliation with the Communist Party and their association with the appellants. Even so, we think the trial court's careful instructions on the weight to be given the testimony of former members of the Communist Party and "so-called informers" was entirely sufficient to caution the jury concerning the treatment to be accorded the testimony of these particular witnesses.[8]

Judgment is AFFIRMED.

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[8] The Court instructed the jury, "In weighing the testimony given by former members of the Communist Party, you should consider whether the circumstances of their membership or their leaving the Party might have given rise to some hostility or prejudice against the Communist Party or against these defendants which might affect the accuracy or truthfulness of their testimony.

"The evidence shows that certain of the Government's witnesses were in times past engaged by the Government as confidential informants to join the Communist Party and make reports to the Federal Bureau of Investigation of such facts as they learned during such association, and they were paid considerable sums of money for their long service while so engaged for procuring evidence, including among other things with respect to the activities of the defendants. In weighing the testimony of such witnesses you should scrutinize their testimony with greater care and caution than if they were not so engaged. In this connection, it should be borne in mind it is sometimes necessary in proving the commission of certain crimes for the Government to rely upon evidence furnished by these so-called informers. All of the factors which might act as an inducement to a witness to deviate from the truth or to color testimony should be considered by you. However, you should not infer that the existence of any of these factors or any one of them in relation to some of the witnesses is of itself sufficient to discredit such witness' testimony. A witness who is a former member of the Communist Party or an informer or who by reason of interest, hostility, bias or hope of reward might be induced to give false testimony may nevertheless testify accurately and truthfully. If you find that such witness has testified truthfully, then such testimony is as good as the truth testified from any other source. What the fact is in this regard as to all the witnesses for both the Government and the defendants is for you to determine in the light of all the circumstances and in accordance with your experience and best judgment."

APPENDIX A2

Opinion Below, Reversing Petitioners' First Conviction (*Dennis et al. v. United States*, 302 F. 2d 5)

Before MURRAH, Chief Judge, and PICKETT and HILL, Circuit Judges.

MURRAH, Chief Judge. These appeals are from judgments convicting the nine appellants of conspiracy to defraud the United States (18 U. S. C. A. 371). The indictment charges, in essence, that appellants, together with five other defendants not involved in this appeal, and others unknown to the Grand Jury, conspired to fraudulently effectuate, on behalf of International Union of Mine, Mill and Smelter Workers, a compliance with Section 9(h) of the Labor Management Relations Act of 1947 (sometimes hereinafter referred to as the Taft-Hartley Act)[1] by means of filing false non-Communist affidavits and to thereby obtain and use the facilities and services of the National Labor Relations Board (sometimes hereinafter referred to as N.L.R.B., or Board).

Appellants were all officers or employees of the International Union of Mine, Mill and Smelter Workers (sometimes hereinafter referred to as Mine-Mill, or Union) within the period beginning in 1949 and ending in 1956, during which the alleged conspiracy existed.

It is here urged that the indictment does not state an offense; that motions for the production of grand jury testimony and statements under Section 3500, Title 18 U. S. C. A. and motions for severance, change of venue, continuance and for a new trial were improperly denied; that the evidence is insufficient to support the judgments as to any of appellants; that the trial court erred in the admission and exclusion of evidence; and that the summation by the prosecution and the court's charge to the jury

[1] The court summarized Section 9(h).

were prejudicially erroneous. Appellants also preserve issues concerning the constitutionality of the general conspiracy statute (18 U. S. C. A. 371), the non-Communist clause of the National Labor Relations Act of 1947 (29 U. S. C. A. 159 (h)), and Section 3500, solely for further review in the Supreme Court.

In a comprehensive opinion, the trial court analyzed and sustained the sufficiency of the indictment here under attack. United States v. Pezzati, 160 F. Supp. 787. We are in full agreement with the reasoning and conclusion contained in that opinion and, for the reasons there stated, hold that the indictment charged an offense against the United States.

Appellant-Travis moved for severance, continuance, and change of venue on the ground that his recent convictions in the same court for the substantive offense of filing false non-Communist affidavits, with extensive attendant publicity, precluded a fair trial. The remaining appellants each moved for severance on the ground that they suffered prejudice by being jointly tried with Travis. Appellants acknowledge, of course, that such relief is largely within the discretion of the trial court, and that its ruling will not be disturbed in the absence of clear abuse. And see Opper v. United States, 348 U. S. 84.

These motions bring into focus the basic right to a fair and impartial trial, and we proceed on the premise that this right transcends any right to prejudicially publicize or sensationalize its collateral aspects. And, it is no answer to say that an unfair trial is the only one obtainable under the circumstances. See Marshal v. United States, 360 U. S. 310; Irvin v. Doud, 366 U. S. 717. But the mere fact of unfavorable publicity does not of itself raise a presumption of prejudice. See Blumfield v. United States (8 CA) 284 F. 2d 46, cert. den. 365 U. S. 812. The prejudice must have manifested itself so as to corrupt due process.

Appendix A2

In ruling on Travis' pre-trial motions for severance and continuance on the grounds of prejudicial publicity, the trial court indicated that the proper remedy was change of venue, and invited such motion. The record indicates that such motion did not come until after the jury was empanelled and the question of jeopardy was apparent. Moreover, there was no showing that the unfavorable publicity so saturated the community-mind as to render a fair trial unlikely. Indeed, the record affirmatively shows that only four members of the jury had ever heard of Travis and there was no showing that these four were in any way prejudiced by their knowledge of him.

The motions of the remaining appellants, in addition to the publicity touching Travis' previous trials, also alleged that their joint trial would be prejudicial because certain admissions and other evidence concerning Travis would come before the jury. But, by reason of the very nature of a conspiracy case and the overwhelming evidence as to Travis' status as one of the conspirators, the evidence as to his admissions and activities would have come before the jury regardless of his physical presence. In these circumstances, we do not think the trial court erroneously refused these motions.

The sufficiency of the evidence: without minutely detailing the proof presented by the government, it is sufficient to note that while conflicting, the evidence was such that the jury could, and obviously did, find that appellants, prior to the filing of the affidavits in question,[2] were members of or affiliated with the Communist Party; that such membership or affiliation continued after the filing of the affidavits; and that at least some of the affidavits thus filed were false. Equally sufficient is the proof that the

[2] There were thirty-eight (38) non-Communist affidavits filed by the six appellants who were officers of Mine-Mill during the critical period.

purpose of filing the affidavits was to obtain the services and facilities of the N.L.R.B. and that Mine-Mill did, by means of such affidavits, secure and use those facilities.

Appellants are not, however, charged with the substantive offense of filing false affidavits. They are charged with conspiracy to defraud the United States and the conspiracy, or unlawful agreement, is the gist of the offense. Braverman v. United States, 317 U. S. 49, 54; Carlson v. United States (10 C. A.) 249 F. 2d 85.

Appellants contend that the evidence is totally lacking with respect to proof that any of them agreed or conspired together, or with any other persons, to accomplish the fraud. As proof of a conspiratorial agreement encompassing all of the appellants, the government undertook to show that aside from their respective positions in Mine-Mill, the accused, as members of the Communist Party, concertedly acted in accordance with a contemporaneous Communist Party policy of having its members occupying official Union positions file false affidavits in order to avail their Union of the services of the N.L.R.B.

The government's proof satisfactorily established that in 1947, upon passage of the Taft-Hartley Act, Mine-Mill adopted a policy of noncompliance which continued until July 1949, when its International Executive Board unanimously voted to comply.[8] It was further shown that Mine-Mill's policy of noncompliance, extending through 1948 and into 1949, was the same as that of the Communist Party. And, the government introduced four pieces of evidence intended to prove, inter alia, that Mine-Mill's change of policy was the implementation of a like Communist Party policy change:

1. Witness Loutner testified that in 1949 he was a Party functionary, a member of the National Review Commission,

[8] The Executive Board was, apparently, comprised of ten members, including appellants Van Camp, Powers, Travis and Wilson.

head of the New York State Review or Disciplinary Commission, and member of the New York Organizational Commission of the Communist Party and that in June of that year, he attended a meeting of the Organizational Committee in New York where one Sid Stein, whom he identified as an Assistant Secretary of the Party Labor Commission, discussed Party policy and its application relative to compliance or noncompliance with the Taft-Hartley Act. Specifically, Loutner testified that Stein said: "(T)hat our (the Party) position in the light of the situation at that particular moment must be a principle position * * * based on a consideration that we must not resign leadership in * * * the trade union movement and * * * that kind of principle understanding necessitates a change in our technical approach in relation to the Taft-Hartley noncompliance law * * * that the Party in that particular recent period suffered a lot of losses because of various raids, and that it was then the considered judgment of the Party that for the sake of carrying out a principle position there would have to be compliance with the Taft-Hartley law, as far as non-Communist affidavits are concerned * * * that there will be Party leaders in the labor movement * * * who will resign publicly. They will state in their public resignation that that resignation does not necessarily mean that they broke with the ideology or the principles of the Communist Party, but that this resignation is forced upon them in order to maintain and stay with their membership and give leadership and guidance to them. * * * Ways and means will be found to maintain contact and liaison with the Party leadership. * * *

2. Witness Mason testified that he was a member of the Board of Mine-Mill in 1941-1942 and from 1945 to 1953, inclusive, and that in the summer of 1949, at least a month before the July meeting of the Executive Board of Mine-Mill, he had a conversation with appellant-Travis in which "Travis said that quite a number of people out in the field

were in favor of the Union changing its position on the Taft-Hartley law, that difficulties of organizing and retaining * * * our membership as a union that is not complying with the Taft-Hartley law and therefore unable to use the machinery provided by the National Labor Relations Board, these difficulties were increasing and that there was discussion going on within the Party concerning the change in this position and (speaking to Mason) 'You'll be happy to learn that the boys in the Party are considering changing our position on this and you'll be hearing about it pretty soon'." Mason further testified that about a week after the meeting of the Executive Board in which the decision to comply was made, he asked Travis how that decision would affect Travis' position as Secretary-Treasurer of the Union and that Travis replied that he would not have to resign as Secretary-Treasurer " * * * but that he will now have to resign from the Party." Mason stated that Travis showed him a written statement of resignation from the Party and told him that it was "cleared with Ben Gold and the Party people in New York * * *."

3. Witness Fikes testified that he was a member of the Communist Party in 1949, and that during the summer of that year he attended a meeting at which appellant-Wilson said " * * * he had just attended a meeting at the national office and also a party meeting, and that the decision had been made to comply" and that "the officers would fill out the letter of resignation to the party, but that it wouldn't mean anything, that it would be a phoney letter and that it, in his opinion, was a correct decision."

4. Witness Gardner testified that in 1951, when he was a Communist Party member working in the office of appellant-Dennis in Cleveland, Ohio, that he had access to the files of that office and that he found therein the letter of resignation from the Communist Party filed by Dennis and

that "I asked him whether he thought it was advisable to leave such a letter as that in the Union files and he assured me that he could see nothing wrong with it because we certainly understood that these letters were sent out, by all of the Party leaders at the time of the signing of the Taft-Hartley affidavits and that there was nothing wrong with it being there, it was simply a record to avoid prosecution under the Taft-Hartley Act * * *."

Appellants vigorously attack the competency of Loutner's testimony, which, unlike the testimony of Mason, Fikes and Gardner,[4] was introduced against appellants collectively. Loutner was not named in the indictment as an alleged co-conspirator, nor was he shown to have had any connection with such conspiracy. The statements which he attributed to Stein were not made in the presence of any of the appellants and, having been introduced to prove the fact of a Party policy change (i.e. proof of the matter asserted) they were clearly hearsay. And, unless they came within some exception to the hearsay rule, they were inadmissible. Hopt v. Utah, 110 U. S. 574; Donnelly v. United States, 228 U. S. 243, 273; Baltimore American Ins. Co. v. Pecos Mercantile Co. (10 CA), 122 F. 2d 145, 146; Flintkote Co. v. Lysfjord (9 CA), 246 F. 2d 368, 385, cert. den. 355 U. S. 835.

At trial, the government took the position that Stein's statements were admissible as those of a co-conspirator. However, before the statements of an alleged co-conspirator may be received in evidence as an exception to the hearsay rule, it is necessary that there be some competent proof, aliunde, from which the jury could conclude that the speaker was a member of the conspiracy. Glasser v. United States, 315 U. S. 60, 74; Clune v. United States, 159 U. S. 590, 593;

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[4] The conversations testified to by Mason, Fikes and Gardner were admitted into evidence under the court's cautionary instruction for the jury to consider them only as against the declarants.

Panci v. United States (5 CA), 256 F. 2d 920; Kamanosuke Yuge v. United States (9 CA), 127 F. 2d 683, 689. We find no such evidence. The sole testimony relative to Stein is that given by Loutner.

The government contends, however, that there was evidence from which the jury could infer that appellants Travis and Wilson knew who Stein was and that it was therefore permissible for the jury to conclude that Stein was a member of the conspiracy. But even assuming that such was the proof, it fell far short of connecting Stein to the alleged conspiracy—a prerequisite to the competency of his statements. Clearly, the admission of Loutner's testimony as to what Stein said was improper. And though some error in the admission of testimony is almost inevitable in a lenghty trial such as this, we cannot overlook the devastating effect of Stein's statements which blueprinted for the jury the formation of the alleged conspiracy and the means by which it was to be carried out and which were emphasized by the government in both its opening and closing arguments. The admission of this testimony was undoubtedly prejudicial error and requires reversal.

But even in the absence of Loutner's testimony, the statements made by appellants Travis and Wilson relative to a change in Party policy; the record proof that appellants, as Party members, subjected themselves to Party discipline; the evidence that a "Steering Committee", of which some of the appellants were members, transmitted "the Communist Party program, decisions, to the Union • • •" for implementation; appellants' common knowledge of the problems presented by the Taft-Hartley Act; and the common bonds existing between appellants as members of the Communist Party and as officers and employees of Mine-Mill—furnish competent evidence which, viewed in the light most favorable to the government, authorized the jury's finding that the filing of the false affidavits was the agreed means of perpetuating Communist influence in Mine-

Mill, and not a series of unrelated and coincidental acts. Indeed, a conspiratorial agreement is seldom susceptible of direct proof. And, ordinarily, as here, the unlawful agreement can only be established by the acts and conduct of the conspirators and the inferences to be drawn therefrom. Jones v. United States (10 CA), 351 F. 2d 288, and cases there cited.

Viewed in the light of this evidence, the dismissal of the indictment is inappropriate. And, we thus turn to an examination of the proof allegedly connecting each appellant with the conspiracy. Specifically, appellants Dichter, Durkin, Powers, Sanderson and Van Camp contend that the evidence is lacking in this regard.

Irving Dichter:

Dichter attended a Union Wage Policy Conference in Denver, Colorado in 1948 where he supported the noncompliance policy. Also in 1948, as an International Representative of Mine-Mill, Dichter attended a meeting of the Die Casting Council in Cleveland, Ohio at which Kenneth Eckert (International Executive Board Member representing the Die Casting Division of Mine-Mill) proposed a resolution to change the Union policy from one of noncompliance to compliance. Dichter had learned of the resolution earlier that day and had told Eckert that it "was a sneaky thing to do, that he (Eckert) should have presented the resolution to the staff * * * rather than handed it to the staff a few minutes before the meeting was to take place, and that he (Dichter) was going to call Travis and get him into Cleveland right away." Appellant Travis arrived in Cleveland the next day and a Communist Party meeting was held. Present at this meeting were Joe Brandt (identified as Labor Secretary of the Communist Party), appellants Travis, Dichter, Dennis and other persons. Brandt stated "that the Union should suspend Eckert from office, cut off

his expense accounts and do everything possible to restrict him financially so that he couldn't go out and contact other locals in the surrounding area and * * * Eckert would be publicly expelled from the Communist Party and * * * that as of that time on, we (Party members) were to observe Party discipline and not have any social contacts or discussions with Eckert." Appellant-Travis then stated that he "was going to suspend Eckert from office and he was going to place Irving Dichter in charge of the Cleveland office * * *." Thereafter Dichter took over the Cleveland office and held staff meetings which, at his invitation, Joe Brandt attended. Dichter appeared at an N.L.R.B. election in 1953, and in 1955, upon becoming a Board member of Mine-Mill, he filed a non-Communist affidavit. Shortly thereafter, Dichter conducted an investigation for the Communist Party in order to determine the activities of one of the Party members suspected of leading an anti-Travis movement within the Union. During this investigation, Dichter stated and emphasized that "Mine-Mill was the last stronghold of the Party in the great union movement" and expressed "the importance of holding onto that * * *." In 1956, Dichter filed two more affidavits.

We think this evidence sufficient, in light of the general scheme established by the government's proof, to connect Dichter to the conspiracy.

James Durkin:

Durkin attended a Communist Party meeting in Denver, Colorado in 1948, at which it was decided that Communist officials of the Union would not sign the non-Communist affidavits. In 1952, Durkin, a former President of Office Workers International Union, became an International Representative of Mine-Mill. The next year, upon being asked how his affiliation with Mine-Mill had come about, he stated "that after the Office Workers Union had folded up in New York * * * he was then available for an assignment

and that the Communist Party in New York had suggested that he could strengthen the leadership of the Party in the trade union movement in the Chicago area, and that they had an opening there in Mine-Mill for him." In 1955, Durkin contacted Fred Gardner, who was the subject of the anti-Travis movement being investigated by appellant-Dichter, and told him that "the Party was interested in getting (Gardner's) position * * * and for that reason they were holding a meeting * * * and wanted (Gardner) to be sure and be there * * * to explain (his) position again officially for the Party." Durkin attended the meeting.

This evidence, while unquestionably sufficient to show that Durkin was a member of the Communist Party, had no bearing upon the conspiracy to fraudulently obtain the services of the N.L.R.B. The "anti-Travis" movement was a result of Travis' handling of a strike settlement and had no relationship to the filing of false non-Communist affidavits. And even though this evidence was sufficient to support the inference that Durkin had knowledge of the conspiracy, it did not tend to prove that he had in any way become a part thereof. Indeed, he did not file any affidavits and, with the sole exception of attending an N.L.R.B. election in 1953, he performed no acts which might reasonably be said to have been in furtherance of a conspiracy.

Mere knowledge, approval or acquiescence in the object or purpose of a conspiracy does not make one a conspirator. *Cleaver* v. *United States*, (10 CA) 238 F. 2d 766. Accordingly, we hold the evidence to be wholly insufficient to support the conviction of Durkin.

Chase Powers:

In 1948, Powers was a member of the "Steering Committee" which implemented Communist Party policy within the Union. As an International Executive Board Member, he attended the 1948 meeting of that Board and advocated

the policy of noncompliance. And, in 1949, he was a member of the Board which changed Mine-Mill's policy to one of compliance.

Powers' position on the "Steering Committee" was evidence of his membership in the Communist Party in 1948, but we find no evidence that such membership continued into the period extending from June 1949 to November 1956, during which the conspiracy existed and, a fortiori, no evidence that any of the ten affidavits filed by him during such period were false. The government contends that statements made by Powers during 1953 indicate that he had knowledge that the Communist Party still had influence in the Union. But even so, there was no evidence that he knew that any of the officers of the Union were Communists during the time they were required to file affidavits or that he had any knowledge of any conspiracy to have such officers falsify such affidavits. Without knowledge, the intent to participate in an established conspiracy cannot exist, and " * * * to establish the intent, the evidence of knowledge must be clear, not equivocal." Ingram v. United States, 360 U. S. 672, 680. For these reasons, Powers' motion for acquittal should have been granted.

Harold Sanderson:

Sanderson was present at the meeting of the "Steering Committee" in 1949 when the 1948 decision of noncompliance on the part of the Communist Party was disclosed. After the International Executive Board of Mine-Mill had decided to change the policy of the Union, Sanderson was named to handle the questions raised by local unions about the filing of the affidavits. In 1953, Sanderson had a conversation with Fred Gardner in which he stated " * * * that there was a very dangerous factional situation within the Party in the Coeur d'Alene (Idaho) area and within the members of the Mine, Mill Smelter Workers, particu-

larly." That "this factionalism was the result of the resignation of a former International Staff member * * * that I (Gardner) was to be careful on the manner in which I worked in there, to try to remain aloof from these factions until such time as * * * the leadership of the Party * * * felt that it was advisable for me to meet with the Party * * *." And at a Party meeting in 1955, attended by appellants Travis, Durkin and Sanderson, it was Sanderson who requested Gardner to state his anti-Travis position for the Party. Additionally, Sanderson notarized the affidavits filed by appellants Travis, Dennis and Powers in 1954.

The evidence is strong that Sanderson was a member of the Communist Party during the conspiratorial period, and the inference that Sanderson, as a member of the "Steering Committee", knew the identity of the others of Mine-Mill's higher echelon who were Party members is entirely reasonable. Certainly his Party associations with Travis, Gardner and Durkin during the critical period support this conclusion. And, his activities in furnishing liaison to the local unions on the problems arising out of the decision to comply with Taft-Hartley and in subsequently notarizing some of the false affidavits are sufficient, in our view, to support the jury's finding that Sanderson was a conspirator.

Jesse Van Camp:

Van Camp attended a Communist Party meeting in East St. Louis, Missouri in 1948, at which appellant Dennis reported on his recruiting of new Party members. At Mine-Mill's 1949 convention, subsequent to the International Board's decision to comply with Taft-Hartley, and after having filed an affidavit himself, Van Camp told Gardner that "at a Communist Party meeting he agreed to step aside as Board member * * * to permit Raymond Dennis to become the Board member, and at that time he

expected to become the Regional Director" of his area. Additionally, Van Camp assisted in N.L.R.B. election campaigns in 1950 and 1952.

This evidence was adequate to establish Van Camp's membership in the Communist Party and the falsity of the affidavit which he filed. And, his nomination of a known Communist to succeed him in a position which he knew, under these circumstances, would require the filing of a false affidavit, supports the jury's finding that he was a knowledgeable participant in the conspiracy.

Without tediously arraigning the proof relating directly to appellants Dennis, Skinner, Travis and Wilson, it is enough to say that their individual acts and declarations were forcefully demonstrative of their culpable association in the conspiracy.

Since, as we have noted, the prejudicial quality of the Loutner testimony requires reversal, it is necessary to treat only those of the remaining allegations of error arising from situations which, upon retrial, are likely to recur. In our view, these situations are confined to the trial court's denial of appellants' motions for the production of grand jury testimony for use on cross-examination and the correctness of certain instructions relating to issues necessarily inherent in the case.

Appellants contend that the trial court's denial of their motions for "in camera" examination of the testimony of various witnesses given before the grand jury was erroneously based upon appellants' failure to disclose inconsistencies. Of course it is now well settled that the traditional secrecy of the proceedings before a grand jury will be broken only upon a showing of a "particularized need." See *United States* v. *Procter & Gamble*, 356 U. S. 677; *Pittsburgh Plate Glass Co.* v. *United States*, 360 U. S. 395. And, we have recently held that the necessity of demonstrating a "particularized need" extends equally to requests for examinations "in camera." *Bary* v. *United States* (10 CA)

292 F. 2d 53. In our case, appellants moved for the production of grand jury proceedings at the conclusion of the testimony given by the government's first witness. The trial court stated: "The court doesn't feel that the defendant has shown either a particularized need, as the word is used in the *Pittsburgh Glass* case, or any reason, as a matter of fact, valid or otherwise, why the court should inspect them to determine whether or not there are inconsistencies." The trial court's subsequent rulings on like motions were entirely consistent with the appropriate test of "particularized need" and in view of the availability of the transcripts of testimony relating to the same subject matter given by many of the government witnesses before other tribunals and the voluminous statements of such witnesses produced under 18 U. S. C. A. 3500, we do not think the trial court abused its discretion in refusing to undertake an "in camera" examination of the grand jury proceedings for the purpose of ferreting out possible inconsistencies.

It is additionally contended that the trial court erroneously refused to instruct the jury as to the significance of membership or affiliation prior to the signing of the non-Communist affidavits, or to instruct that a member could resign from the Party and lawfully sign the affidavit; that the trial court failed to give an instruction explanatory of the bearing which the evidence was to have as to each of the thirty-eight affidavits filed by appellants throughout the conspiratorial period; and that the trial court's instructions adopted the wrong limitational period.

At several places in the charge to the jury the trial court quoted the form of the affidavit required by the Taft-Hartley Act. That form states: "I am not a member of the Communist Party or affiliated with such Party * * *." The form of the affidavit, which speaks only in the present tense, together with the jury's knowledge that like affidavits were required to be periodically filed by the same person, made it abundantly clear that its falsity depended upon the affiants'

membership or affiliation at the time of filing. And though a specific instruction on the point would have served to eliminate any possible doubt, we cannot say, in view of the entire charge, that the jury was not satisfactorily informed.

As to the assertion that the trial court should have singled out and explained the application of the evidence as to each of the affidavits upon which there had been proof, it is patent that such instructions would have been confusing to the jury and would have served only to disproportionately emphasize those particular ingredients of the government's case.

The jury was instructed that "(T)he statute of limitations is the period of five years immediately preceding the filing of the indictment * * * on November 16, 1956. Thus, the prosecution must prove * * * that the conspiracy continued and that one of the overt acts alleged in the indictment was committed after November 16, 1951." Appellants say that the 1954 Amendment to 18 U. S. C. A. 3282,[5] extending the applicable period of limitations from three to five years, should not be construed as being retroactive, and that the period of limitations applicable to this case was three years. But the amendatory Act (68 Stat. 1145) specifically provided that this "* * * amendment * * * shall be effective with respect to offenses (1) committed on or after the date of enactment of this Act, or (2) committed prior to such date, if on such date prosecution therefor is not barred by provision of law in effect prior to such date." The retroactivity of the amended section is clearly stated and the trial court's instruction thereon was correct.

REVERSED, with instructions to dismiss the indictment as to appellants Durkin and Powers and to grant a new trial to appellants Dennis, Dichter, Sanderson, Skinner, Travis, Van Camp and Wilson.

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[5] This section, as amended, provides that "(E)xcept as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found * * * within five years next after such offense shall have been committed."

APPENDIX A3

Opinion of District Court, Denying Motion to Dismiss the Indictment (*United States* v. *Pezzati, et al.*, 160 F. Supp. 787)

KNOUS, *Chief Judge.* The defendants have interposed a motion to dismiss the Indictment. Extended oral arguments on the motion were heard following which the parties were requested by the Court to submit memoranda on the points and authorities upon which they relied. While several alleged grounds for dismissal were enumerated in the motion, the arguments and memoranda submitted by counsel primarily have been directed to the contention of the defendants that the Indictment does not state facts sufficient to constitute an offense against the United States.

The indictment charges conspiracy to defraud the United States. It covers the period from June 15, 1949, to the date of the return of the indictment, November 16, 1956. The defendants are fourteen officials and employees of the International Union of Mine, Mill and Smelter Workers, a labor organization within the meaning of the Labor Management Relations Act of 1947 (29 U. S. C. 152(5)). The charge is that the defendants were members of and affiliated with the Communist Party and conspired with each other and with other persons both named and unknown:

> (1) Fraudulently to effectuate on behalf of the Union a compliance with section 9(h) of the Labor Management Relations Act of 1947 by means of false and fraudulent statements made to the National Labor Relations Board, an agency of the United States;
>
> (2) Fraudulently to obtain and use for the Union the services and facilities of the Board without a good faith qualification of the Union, and

(3) To pervert and defeat the proper administration of the 1947 Act by the Board.

The indictment asserts, inter alia, that as a part of the conspiracy the defendants would:

(1) File with the Board non-Communist affidavits which would falsely and fraudulently represent that certain Union officers were not members of and affiliates with the Communist Party;

(2) Fraudulently induce the Board to issue to the Union certificates of compliance with section 9(h) of the 1947 Act and fraudulently obtain from the Board the right to make use of the services and facilities of the Board;

(3) With knowledge of the false and fraudulent character of the affidavits and of the fraudulent compliance with section 9(h), use the services and facilities of the Board on behalf of the Union.

The indictment alleges twenty-one overt acts. The first in point of time is said to have occurred on July 19, 1949, and the last on August 11, 1955.

Section 9(h) of the Labor Management Relations Act of 1947 (29 U. S. C. 159(h)) reads:[1]

Section 35A of the Criminal Code referred to in the above-quoted statute was repealed by the Act of June 25, 1948, 62 Stat. 862, and is now covered by various sections of Title 18 U. S. C. Of these, only 18 U. S. C. § 1001 is pertinent. It provides:[2]

The indictment charges a violation of 18 U. S. C. § 371 which, so far as pertinent, provides:[3]

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[1] The court quoted Section 9(h).

[2] The court quoted Section 1001.

[3] The court quoted Section 371.

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The position of the Government is that the indictment charges a conspiracy "to defraud the United States" and *not* a conspiracy to commit offenses.

Hence, the argument of defense counsel that the indictment is insufficient to state an offense under the conspiracy to commit offenses clause of section 371, supra, need not be considered since, as has been stated, the Government relies solely on the sufficiency of the indictment to charge a conspiracy to defraud the United States.

The fraud on the United States is alleged by the Government to be the use of the facilities and services of the Board for the Union after the fraudulent compliance with section 9(h) by filing of the non-Communist affidavits required by section 9(h) of the 1947 Act. As noted above, this section provides that before a union has certain rights under the Act affidavits must be filed with the Board stating that union officers are free from membership in or affiliation with the Communist Party.

Section 9(h) does not violate the Federal Constitution (*American Communications Association* v. *Douds* (1950), 339 U. S. 382). As stated by the United States Supreme Court, the purposes of section 9(h) are:

> (1) "to protect the public not against what Communists * * * advocate or believe, but against what Congress has concluded they have done and are likely to do again" (*American Communications Association* v. *Douds, supra,* p. 396).
>
> (2) to "wholly eradicate and bar from leadership in the American labor movement, at each and every level adherents to the Communist party and believers in the unconstitutional overthrow of our Government" (*National Labor Relations Board* v. *Highland Park Co.,* (1951) 341 U. S. 322, 325);
>
> (3) "to stop the use of the Labor Board by union leaders unwilling to be limited in government by the processes of reason" (*National Labor Relations Board* v. *Dant,* (1953) 344 U. S. 375, 385).

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Upon their voluntary compliance with the conditions prescribed, section 9(h) makes available to labor organizations the benefits and advantages arising from

(1) the Board's investigation of questions raised by labor organizations concerning the representation of employees, and

(2) the Board's issuance of complaints pursuant to a charge made by a labor organization (*United Mine Workers* v. *Arkansas Oak Flooring Co.* (1956), 351 U. S. 62, 70, 73).

These rights are of the utmost importance to trade unions. As said in *American Communications Association* v. *Douds, supra,* p. 390:

"The fact is that § 9(h) may well make it difficult for unions to remain effective if their officers do not sign the affidavits."

Section 9(h) makes Section 35A of the Criminal Code applicable to the required affidavits. In *Leedom* v. *International Union of Mine, Mill and Smelter Workers* (1956), 352 U. S. 145, and *Amalgamated Meat Cutters, etc.,* v. *National Labor Relations Board* (1956), 352 U. S. 153, it was held that (352 U. S. 156):

"• • • the sole sanction for the filing of a false affidavit under § 9(h) is the criminal penalty imposed on the officer who files a false affidavit, not decompliance of the union nor the withholding of the benefits of the Act that are granted once the specified officers file their § 9(h) affidavits."

The prosecution here is for conspiracy to defraud in violation of the general conspiracy statute, section 371. It is not a prosecution under section 1001, the false statements

statute. In *Leedom* v. *International Union of Mine, Mill and Smelter Workers, supra*, p. 148, the Court said, with reference to section 9(h):

> "We start with a statutory provision that contains only one express sanction, viz., prosecution for making a false statement."

The first question is whether a prosecution under section 371 may be maintained. Section 9(h) does not expressly repeal section 371. It is a cardinal rule of construction that repeals by implication are not favored (*United States* v. *Borden* (1939), 308 U. S. 188, 198). Where Congress by more than one statute proscribes a private course of conduct, the Government may choose to invoke either applicable law (*Rosenberg* v. *United States* (1953), 346 U. S. 273, 294). The existence of a specific criminal statute or a reference thereto such as appears in section 9(h) does not preclude prosecution under other applicable statutes (cf. *Edwards* v. *United States* (1941), 312 U. S. 473, 483-484; *United States* v. *Gilliland* (1941), 312 U. S. 86, 95-96; *Wallenstein* v. *United States* (1928), 3 Cir., 25 F. (2d) 708). As I read *Leedom* v. *International Union, supra*, it does not preclude a prosecution under section 371 for conspiracy to defraud the United States by perverting the lawful function of the Board by means of deceit and chicanery.

Defendants argue that fraud is not an essential element of an offense covered by section 1001 and that a conspiracy to commit a statutory offense of which fraud is not an essential element is punishable only under the offense clause of section 371. From these premises they conclude that this indictment admittedly based upon the conspiracy to defraud clause of section 371 must fall. Defendants cite numerous cases arising under the Wartime Suspension of Limitations Act (18 U.S.C. § 3287) and comparable statutes. These statutes, among other things, extended the period of limitations applicable to offenses involving any fraud or

attempted fraud against the United States. There provisions have been determined to apply only to offenses involving a fraud of a pecuniary nature or to offenses of which fraud is an essential ingredient (*Bridges* v. *United States* (1953), 346 U. S. 209, 221—conspiracy to defraud by false statement in naturalization proceeding; *United States* v. *Grainger* (1953), 346 U. S. 235, 244—conspiracy to defraud by false claims; *United States* v. *Scharton* (1932), 285 U. S. 518, 521—income tax evasion; *United States* v. *McElvain* (1926), 272 U. S. 633, 638—conspiracy to defraud by false income tax returns; *United States* v. *Noveck* (1926), 271 U. S. 201, 203—perjury; *Marzani* v. *United States* (1948), C.A.D.C., 168 F. (2d) 133, 135-137, affirmed without opinion by equally divided court, 335 U. S. 895, 336 U. S. 922—False Claims Act; *United States* v. *Obermeier* (1950), 2 Cir., 186 F. (2d) 243, 256-257, certiorari denied 340 U. S. 951—false statement in naturalization proceedings; *United States* v. *Klinger* (1952), 2 Cir., 199 F. (2d) 645, affirmed by equally divided court, 345 U. S. 979—conspiracy to defraud by obstructing the lawful functioning of the Office of Price Administration in the rationing of sugar; *United States* v. *Lurie* (1955), 7 Cir., 222 F. (2d) 11, 13-15, certiorari denied 350 U. S. 835—conspiracy to defraud by false statements made to War Assets Corporation and War Assets Administration in connection with administration of sale of surplus property under the Surplus Property Act of 1944; cf. *United States* v. *Showalter*, (1952) D.C.N.D. California, 103 F. Supp. 806—violation of Servicemens' Dependents Allowance Act).

These cases merely hold that for the suspension of limitations acts to be effective there must be an offense involving a pecuniary loss or an offense of which fraud is an essential ingredient. In none of those cases is there a holding that the indictment or information then under consideration failed to state an offense against the United States.

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The fallacy of defendants' argument lies in the premise that the indictment here charges a conspiracy to commit a statutory offense (violation of section 1001) of which fraud is not an essential element. I do not so read the indictment. The charge here is conspiracy to defraud the United States by fraudulently effectuating a compliance with section 9(h), by fraudulently obtaining for the Union the use of the facilities of the Board, and by perverting and defeating the administration of the 1947 Act by the Board. The use of allegedly false non-Communist affidavits was only an incident of the conspiracy.

In a conspiracy charge the conspiracy is the gist of the offense (*Braverman* v. *United States* (1942), 317 U. S. 49, 54). This prosecution is not laid under section 1001. The question of whether fraud is an essential element of an offense under section 1001 is immaterial. Instead we have the question of whether the indictment sufficiently charges, under section 371, conspiracy "to defraud the United States, or any agency thereof in any manner or for any purpose."

The statute is broad enough to include any conspiracy for the purpose of impairing, obstructing, or defeating the lawful function of any department of the federal government (*Haas* v. *Henkel* (1910), 216 U. S. 462, 479). The phrase "conspire * * * to defraud the United States" includes within its meaning interference with or obstruction of one of the functions of the federal government by deceit, craft, trickery, or dishonesty (*Hammerschmidt* v. *United States* (1924), 265 U. S. 182, 188).

Defendants rely heavily on *Bridges* v. *United States, supra.* As I read that decision, it does not support their arguments. The *Bridges* case specifically recognizes *Haas* v. *Henkel and Hammerschmidt* v. *United States* (see 346 U. S. 221, note 19), and points out that those cases refer to conspiracies to defraud in violation of the second clause

of the general conspiracy statute (section 371) and do not control the interpretation of the Wartime Suspension of Limitations Act. In the *Bridges* case the Court refers to *United States* v. *Cohn* (1926), 270 U. S. 339, which at page 346 distinguishes a conspiracy to defraud under the general conspiracy statute from an offense under the False Claims Act.

Under the *Leedom* and *Amalgamated Meat Cutters* cases, *supra*, the Court held that the Board could not decertify a union because false non-Communist affidavits were filed. Defendants argue from this that as the Board must proceed even in the event of false affidavits, there is no fraud on the Government. In other words, the successful operation of the fraud would deprive the transaction of its fraudulent character. This argument is refuted by its mere statement (*United States* v. *Keitel* (1908), 211 U. S. 370, 394).

In the *Leedom* case it was said (352 U. S. 148):

> "The filing of the required affidavits by the necessary officers is the key that makes available to the union the benefits of the Act."

While it may be that so far as the Board is concerned a false key is just as adequate as a true key, the persons who use that false key to unlock the door and obtain for the union benefits to which the union would not otherwise be entitled thereby defeat the purposes which the United States Supreme Court has said that Congress intended to effectuate by section 9(h). The indictment herein adequately charges a conspiracy to defraud the United States by the impairment, obstruction, and defeat of a lawful function of the Board. In my opinion, it sufficiently states an offense against the United States.

APPENDIX B

Statutes Involved

CONSTITUTION OF THE UNITED STATES:

Art. I, Sec. 9, Cl. 3 provides: No Bill of Attainder or ex post facto Law shall be passed.

The Fifth Amendment provides, in part: No person shall ——— be deprived of life, liberty, or property, without due process of law; ———.

STATUTES:

1. 18 U. S. C. 371 provides:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

2. 18 U. S. C. 1001 provides:

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

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3. 29 U. S. C. 159(h) (Section 9(h) of Taft-Hartley) provided [1]:

No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a change made by a labor organization under subsection (b) of section 160 of this title, unless there is on file with the Board an affidavit, executed contemporaneously or within the preceeding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of sections 286, 287, 1001, 1022 and 1023 of Title 18 shall be applicable in respect to such affidavits.

4. 28 U. S. C. 1732 provides:

In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

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[1] Repealed by Section 201(d) of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 525.

All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

The term "business", as used in this section, includes business, profession, occupation, and calling of every kind.

5. 28 U. S. C. 1733 provides:

(a) Books or records of account or minutes of proceedings of any department or agency of the United States shall be admissable to prove the act, transaction or occurrence as a memorandum of which the same were made or kept.

(b) Properly authenticated copies or transcripts of any books, records, papers or documents of any department or agency of the United States shall be admitted in evidence equally with the originals thereof.

6. 18 U. S. C. 3500, the "Jencks" law, provides:

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the

entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall deter-

mine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsection (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.